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IN THE
Supreme Court of the United States
OCTOBER TERM, 1943

HARRISON E. FRYBERGER,

Petitioner,

against

CONSOLIDATED ELECTRIC AND GAS COMPANY, a corporation,
and CENTRAL PUBLIC UTILITY CORPORATION, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

HARRISON E. FRYBERGER,

Counsel for Petitioner,

70 Pine Street,

Borough of Manhattan,

New York City, N. Y.

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SUBJECT INDEX

	PAGE
Summary and Short Statement of Matter Involved.....	1
The Pleadings.....	1
I—The undisputed facts in the Record exclude the possibility of the defense of res judicata or of any other defense by respondents.....	3
II—Statement of Jurisdiction.....	7
Assignments of Error.....	8
Questions Presented.....	10
III—There are at least seven different grounds and reasons why it follows there is no evidence in the entire record even tending to sustain the defence of res judicata.....	11
IV—An analysis of the so-called findings of fact found R. fols. 1282-1288 and the so-called conclusions of law found R. fols. 1288-1289, discloses that they are each and all mere baseless conclusions of law which are completely nullified by the real findings of Justice McGeehan found at R. fol. 1291 and by the basic facts of the record as set forth in Point I.....	22
V—The record establishes that respondents practiced misrepresentation and extrinsic or collateral fraud upon Mr. Justice Lydon, the Appellate Division, First Department, and the New York Court of Appeals in the Harris Case; upon Chancellor Wolcott in the Delaware Court of Chancery and upon Mr. Justice McGeehan, the Appellate Division, First Department, and the New York Court of Appeals in the present suit, to such an extent that all the proceedings in	

the Harris Case and Delaware Court of Chancery and the judgments of Justice McGeehan, his order of January 14, 1942, the judgment of the Appellate Division, First Department, and the New York Court of Appeals are all null and void and subject to collateral attack..... 27

VI—The main question left to consider is whether or not the plaintiff in the court below claimed the federal right above referred to or raised the constitutional question in a proper and timely manner. If he did, petitioner is entitled to have his petition granted..... 30

VII—Reasons relied upon for the allowance of the writ 35

TABLE OF AUTHORITIES CITED

	PAGE
A	
Allied Chemical & Dye Corp. v. Steel & Tube Co., 12 Delaware Chancery, 368; 129 At. 414.....	20
B	
Bannon v. Bannon, 270 N. Y. 484-489.....	30
Barnett v. Smart, 158 Mo. 178; 59 S. W. 235.....	15
Bell v. Merrifield, 109 N. Y. 202.....	15
Brewster v. Wooster, 131 N. Y. 473.....	17
Brown v. Fletcher, 210 U. S. 82.....	26
Brown v. McKie, 185 N. Y. 303.....	15
Budniskey v. Areklian, 268 N. Y. 208-210-211.....	12
C	
Cammell v. Newell, 3 H. & N. 617-646; 26 N. Y. supra.....	20
Carlson v. Curtiss, 234 U. S. 103-106.....	26
Carter v. Texas, 177 U. S. 442-447.....	26
Chicago, M. & St. P. R. R. Co. v. Coogan, 271 U. S. 472	6, 22
Cobb v. Interstate, 20 Fed. (2d) 786.....	13
Cowenhoven v. Ball, 118 N. Y. 231-235.....	30
D	
Dobson v. Pearce, 12 N. Y. 156.....	27
Dodge v. Cornelius, 168 N. Y. 242.....	30
Donahue v. New York Life, 259 N. Y. 98-102.....	16
E	
Erie v. Purdy, 185 U. S. 148-150.....	25, 30

	PAGE
F	
First National Bank v. Anderson, 269 U. S. 341.....	26
Farley v. Davis, 116 Pac. (2d) 263 (Wash.).....	29
Fryberger v. Harris, 273 N. Y. 115-117.....	16
Fulton v. Hanlon, 20 Cal. 450.....	15

G	
Garret v. Minard, 82 Kansas 388; 108 Pac. 80.....	28, 29
Gleason v. Thompson, 245 N. Y. 509.....	30

H	
Hansberry v. Lee, 311 U. S. 32-41-45.....	22
Hillyer v. LeRoy, 179 N. Y. 369.....	37
Harjo v. Johnston, 104 Pac. (2d) 985 (Okl.).....	29

I	
In re Department, 85 N. Y. 301.....	30
In re Hanrahan's Will, 109 Vermont 108; 194 At. 473-6	26
In re United States, 66 How. Practice 517.....	30

K	
Kittredge v. Langley, 252 N. Y. 405, 419.....	13

L	
Lapiedra v. American Surety Co., 247 N. Y. 25.....	20
Larne v. Omnicrome, 275 N. Y. 426-431.....	14

M	
Mandeville v. Reynolds, 68 N. Y. 528, 543.....	20
Marine v. Hodgson, 7 Cranch 332-336.....	27
Matter of Buffalo, 78 N. Y. 362.....	30
Matter of Pet, 98 N. Y. 447-452.....	30
Mills v. Baird, 147 S. W. (2d) 312 (Texas).....	29

V

PAGE

N

Norfolk v. West Va., 236 U. S. 605-610.....	26
Northern Pacific v. Boyd, 228 U. S. 482.....	13

P

People v. Houghton, 182 N. Y. 301-304.....	30
Pocatello v. Murray, 21 Idaho 193.....	15
Pocatello v. Murray, 226 U. S. 318.....	15
Postal Telegraph Co. v. City of New Port, 247 U. S. 464	21
Purdy v. Erie, 162 N. Y. 42.....	30

R

Riley v. New York Trust Co., 315 U. S. 343.....	26
Russell v. Place, 94 U. S. 606.....	16

S

Scott v. Dilko, 117 Pac. 2nd 700 (Cal. App.).....	29
Schmid v. Klink Packing Co., Inc., 189 N. Y. S. 543.....	17
Schuyllkill v. Nieberg, 250 N. Y. 304.....	14
Seletsky v. Third Avenue, 44 App. Div. 632.....	35
Seneca v. Leach, 247 N. Y. p. 1.....	23
Shields v. Barrow, 17 How. U. S. 128.....	15
Shields v. Utah, 305 U. S. 177.....	21
Sieleken v. American, 265 N. Y. 239.....	15
Southern Pacific Co. v. Bogert, 250 U. S. 483.....	14
Southern Pacific R. R. Co. v. U. S., 168 U. S. 1, 48.....	21
Stark v. Starr, 94 U. S. 477 at p. 486.....	14
Stade v. Stade, 315 Ill. App. 136 (Ill.).....	29
Swift v. McPherson, 232 U. S. 51 at p. 55.....	6

T

Truax v. Corregan, 257 U. S. 312-324.....	26
---	----

U

United States v. Pink, 315 U. S. 203-256.....	26
United States v. Throckmorton, 98 U. S. 61.....	28

V

Verplanck v. Van Buren, 76 N. Y. 247.....	36
---	----

W

Webster v. Reid, 11 How. (U. S. 437).....	20
Windsor v. McVeigh, 93 U. S. 274.....	22
Wyman v. Newhouse, 93 Fed. (2d) 313.....	28

Y

Youngs v. Goodman, 240 N. Y. 470-473.....	30
---	----

TEXT BOOKS CITED

31 American Jurisprudence, Sec. 654.....	29
Carmody, Vol. VI, Sec. 34.....	35
27 Corpus Juris 470.....	13
34 Corpus Juris 471, 472, 473, Secs. 739, 740, 741.....	29
34 Corpus Juris 565, Secs. 866-868.....	28
18 Encyclopædia of Pleading & Practice, 744 at p. 755.....	13
Freeman on Judgments, 5th Ed., Sec. 1233.....	29
Greenleaf Ev., Secs. 522-523.....	21
Pomeroy's Equity Jurisprudence, Vol. II, Sec. 919.....	29
Simpkins Fed. Practice, 1938 Ed., Sec. 963, p. 684.....	25, 29

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Respondents.**

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK**

*To the Honorable, the Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States of
America:*

The petition of Harrison E. Fryberger respectfully
shows:

Summary and Short Statement of Matter Involved

The Pleadings

This is an action in equity brought by petitioner (plain-
tiff in the Court below) as creditor, in the New York
Supreme Court of New York County on November 25, 1938,
to recover the purchase price of 438 shares of Class A
stock purchased in 1929 and 1930 of Central Public Service
Corporation, a Maryland corporation (which will be herein

referred to for brevity as the C. P. S. Corp.), and to impress an equitable lien upon the assets of said corporation transferred as of August 1, 1932, and thereafter to Consolidated Electric and Gas Company, a corporation of the State of Delaware (which will be herein referred to for brevity as Consolidated) and which assets were also transferred nominally, and in part, to respondent Central Public Utility Corporation, a corporation organized under the laws of the State of Delaware (and which will be herein referred to for brevity as C. P. U. Corp.).

The complaint charges that said Class A stock was worthless and known by C. P. S. Corp. to be worthless at the time of its sale. That in 1929 the C. P. S. Corp. and its managing agents misappropriated proceeds from the sale of 355,631 shares of Class A stock, to wit, the sum of \$14,900,000. Also that in the year 1929 the C. P. S. Corp. and its managing agents misappropriated the sum of \$9,605,850 for the purpose of creating a fraudulent and fictitious supported market and that the Annual Financial Report of the C. P. S. Corp. for the year 1929 was a false, fraudulent and fabricated report (R. fols. 33, 50, 26). The complaint also charges that in the spring of 1932 and subsequently, plaintiff discovered that he had been defrauded and that in April, 1932, and subsequently, plaintiff served notice in writing of rescission of the purchase of the stock. That on May 6, 1932, plaintiff surrendered his certificates for the 438 shares to the C. P. S. Corp., R. fols. 42-44 (also see findings of Justice Lydon No. 101, R. fols. 398-399); that on August 1, 1932, C. P. S. Corp. entered into a fraudulent reorganization under and by virtue of which it transferred substantially all its assets of the actual value of \$116,000,000 to Consolidated and that in equity, Consolidated assumed the payment of all the debts of the C. P. S. Corp., R. fols. 56-57. Prayer for relief, R. fols. 83-86.

Defendants in their answer pleaded three defenses: (1) The Statute of Limitations. This defense was stricken by the Court, R. fol. 1116. (2) Res judicata, based on the

proceedings in a certain suit commenced by the same plaintiff on November 3, 1933, in the New York Supreme Court against one N. W. Harris Company and four other defendants, which defendants included Consolidated and C. P. U. Corp. and which was tried before Justice Richard P. Lydon in 1935. This litigation will be referred to herein for brevity as the "Harris Case". (3) An alleged defense of res judicata based on certain proceedings commenced by the same plaintiff in May, 1937, against Consolidated, C. P. U. Corp. and another defendant in the Delaware Court of Chancery, R. fols. 98, 100-102.

Plaintiff did not serve a reply as he was not required to do so. But pursuant to motion of respondents and the order of the Court, plaintiff served and filed a reply in May, 1941, R. fols. 654-698. The case came up for trial and was tried before Mr. Justice John E. McGeehan, one of the Justices of the New York Supreme Court, on June 17th and 18th, 1941, R. fol. 703.

I

The undisputed facts in the Record exclude the possibility of the defense of res judicata or of any other defense by respondents.

A large amount of evidence was introduced and from this evidence there was at the close of the trial no dispute in the record as to the following facts: The C. P. S. Corp. was organized under the laws of Maryland in 1925, carried on its business with its headquarters in Chicago, Illinois, until August 1, 1932, at which time it ceased to do business. Between 1925 and August 1, 1932, the C. P. S. Corp. sold 2,270,053 shares of Class A stock to some 50,000 or more investors for which it received \$78,998,514.70, R. Harris Case, fols. 1684-1685, and that said shares in the aggregate at the time they were sold were not worth a penny. At the time of the reorganization of August 1, 1932, it

was represented to these 50,000 claimants that the assets of C. P. S. Corp. which were not transferred to Consolidated, were of the value of \$49,000,000, R. Harris Case, fol. 2565. Yet, as shown by the record in the Harris Case (R. fols. 3535, 3092, 3095) and by the documentary evidence introduced before Justice McGeehan, see R. fols. 824-831, Exhibits 6 to 12 inclusive.

Plaintiff's	Exhibit	6,	admitted	R. page	275,	printed	page	321
"	"	7,	"	R. "	275,	"	"	324
"	"	8,	"	R. "	276,	"	"	325
"	"	9,	"	R. "	276,	"	"	325
"	"	10,	"	R. "	276,	"	"	328
"	"	11,	"	R. "	277,	"	"	330
"	"	12,	"	R. "	277,	"	"	330

The value of the entire assets retained could not exceed \$28,000 and these were subject to a valid claim of the United States Government against the C. P. S. Corp. for back taxes in the sum of \$800,000 and it was only by reason of the fact that the United States Government agreed to accept \$100,000 in settlement of this valid claim, that the C. P. S. Corp. was permitted to assert that the assets retained were of the total value of \$28,000. See R. Harris Case, fols. 3487-3492.

Between September 1, 1929, and November, 1930, plaintiff and his assignors purchased 538 shares of this Class A stock for which they paid \$21,084.50. They sold 100 shares thereof on January 21, 1930, for \$3,483 at a loss of \$2,050, and they received \$425.50 from the sale of certain stock dividends. See R. fols. 394-396. Also R. Harris Case, fol. 2024. This left a net investment of \$17,176. See R. fols. 385, 388, 391-395.

An examination of finding No. 101, found at folios 397, 398, 399, discloses that Mr. Justice Lydon made specific findings; that in April, 1932, plaintiff and his assignors served a notice of rescission of the purchase of their 438 shares of Class A stock on the ground that they had discovered that they had been defrauded. For copy of written

notices, see R. Harris Case, fols. 3340-3352. These exhibits of plaintiff were marked in evidence as follows:

134 folio	2138,	printed	page	1114
135	"	2140,	"	1115
136	"	2142,	"	1117

At folio 399, Justice Lydon finds that plaintiff and his assignors on May 6, 1932, served a formal notice and demand of rescission and surrendered the certificates for these 438 shares of Class A stock. For copy of notice, see Harris Case, fols. 3353-3372, marked in evidence as Plaintiff's Exhibit 137 at fol. 2145.

As shown by R. Harris Case, fol. 3580, on May 18, 1932, the C. P. S. Corp. assigned and transferred these certificates for 438 shares of Class A stock to one of its subsidiaries, the Central Securities Transfer Company. As shown by the Plan of Reorganization, Part III, it was specifically provided as a part of the Plan that the assets of the Central Securities Transfer were to be and were assigned by C. P. S. Corp. and its subsidiary to the C. P. U. Corp., an adjunct and agent of Consolidated, and thereby the entire transaction involving the sale and purchase of these 438 shares of stock was cancelled by and with the consent of all parties concerned and as a legal effect of this provision in the Plan of Reorganization, Consolidated entered into a valid and binding agreement under which as a part of the purchase price of the assets transferred to it, it assumed and agreed to repay plaintiff and his assignors what they had paid for these shares of stock, with interest at 6% from the date of purchase.

This part of the plan of reorganization, which is found R. fols. 1084-1085, is as follows:

"Central Public Utility Corporation acquired all of the authorized Common stock of Consolidated Electric and Gas Company, consisting of 1,000,000 shares; and for 463,015 shares of its authorized Common stock Central Public Utility Corporation has acquired or

will acquire from Central Public Service Company all of the outstanding Common stock of Central Public Service Corporation, consisting of 1,250,000 shares and all the outstanding Common stock consisting of 10 shares of Central Securities Transfer Company."

This plan was marked Plaintiff's Exhibit 139 in the Harris case and received in evidence at folio 2191; also marked as Plaintiff's Exhibit 17 in present record and received in evidence at R. fol. 856 found printed at page 347.

The record shows that C. P. S. Corp. transferred to Consolidated 1,999/2000ths of its assets, therefore, Consolidated in equity, assumed and agreed to pay these claims of plaintiff and his assignors. Also in legal effect, Consolidated is the C. P. S. Corp. simply under a change of name.

In a word, it appeared at the close of the trial before Mr. Justice McGeehan, that as a question of law, petitioner (then plaintiff) was entitled to judgment for the entire relief which he sought. During the trial, no ruling, no decision was made by Mr. Justice McGeehan as to the question of plaintiff's right to recover. On June 30, 1941, after the close of the trial, Mr. Justice McGeehan rendered a memorandum decision or ruling (R. fols. 1126-1127), in which he ruled that defendants were entitled to a judgment of dismissal of the complaint on the ground the defense of *res judicata* should be sustained. As this Court has held in the case of *Swift v. McPherson*, 232 U. S. 51 at page 55, if it be true that there was and is no evidence in the record tending to sustain the ruling, then such ruling constituted a denial of a Federal right arising under the laws of the United States. Therefore, this brings us to our next subdivision.*

* This piece of litigation is complicated and petitioner believes he should save this Court as much unnecessary labor as possible. Therefore, in connection with Point I, petitioner cites the recent decision of this Court, *Chicago, M. & St. P. R. R. Co. v. Coogan*, 271 U. S. 472, which holds that on certiorari, this Court will examine the record and reverse for legal insufficiency of the evidence. There are many other points but perhaps the Court may consider that this point is enough.

II

Statement of Jurisdiction

This court has jurisdiction, as provided under Title 28, U. S. C. Section 344, and Section 237b of the Judicial Code, as amended by the Act of February 13, 1925, 43 Statute 937 U. S. Code, Title 28, Section 347 and subsequently which provide that where any right, title, privilege or immunity is set up or claimed by either party under the Constitution, etc., in a State Court, that the power of this Court to review by certiorari may be exercised as well where the Federal claim is sustained as where it is denied.

In the instant case, by the action of the Court below, the New York State Court deprived petitioner of a property right, to wit, of the value of over \$31,000 exclusive of taxable costs and disbursements, the total value being more than \$100,000, and in violation of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

The date of the decision and judgment of the New York State Court sought to be reviewed is July 20, 1943 and the date of this application is October 18, 1943. Petitioner fully complied with the provisions of the recent New York Statute found in Chapter 297 of the Laws of New York for the year 1942 which amended the New York Laws as to appeals to the New York Court of Appeals. On February 13, 1943, the Appellate Division, First Department denied permission to plaintiff to appeal to the New York Court of Appeals from the judgment of January 21, 1943 and on April 22, 1943, the New York Court of Appeals denied permission to plaintiff to appeal to said New York Court of Appeals from said judgment of January 21, 1943. Copies of said two last orders are printed herewith.

Under Rule 12 of this Court, the burden is on petitioner at this time to present decisions showing (1) that the Constitutional or Federal question involved is substantial and (2) that the Constitutional question or question of Federal right was duly raised and claimed before Mr. Justice McGeehan in proper and timely manner.

Assignments of Error

The Supreme Court of New York County, State of New York, erred in the following respects:

1) In holding as set forth in its memorandum decision of June 30, 1941, R. fols. 1126-1127, that respondents (defendants in the Court below) were and are entitled to have the present suit dismissed on the merits by reason of the defense of res judicata. There is no evidence in the Record tending to sustain this ruling.

2) In holding as set forth in its memorandum decision of January 14, 1942, R. fols. 1277-1280, that there is no Constitutional question and no question of Federal right involved in this case and that plaintiff had had his day in Court and in denying plaintiff's motion found at R. fols. 1132-1152, et seq., to vacate said memorandum decision of June 30, 1941, on the ground it deprived plaintiff of his property in violation of the Due Process Clause of the Fourteenth Amendment of the Federal Constitution.

3) At the close of the trial of June 17th and 18th, 1941, the undisputed evidence in the Record precluded the possibility of the defense of res judicata or any other defense by respondents and the Trial Justice erred in refusing to so hold.

4) An analysis of the so-called findings of fact found R. fols. 1282-1288 and the so-called conclusions of law found R. fols. 1288-1289 discloses that they are each and all mere baseless conclusions of law which are completely nullified by the real findings of Justice McGeehan found at R. fol. 1291 and by the basic facts of the Record as set forth in Point I. The Supreme Court of New York County erred in refusing to so hold.

5) As set forth in Point V herein, page 27 of this petition, the Record shows that these two respondents (defendants in the Court below) entered into a combination to nullify the proceedings instituted by petitioner before Mr. Justice Lydon, the Appellate Division, First Department, the New York Court of Appeals in the so-called Harris Case, and the proceedings instituted by petitioner before the Delaware Court of Chancery, and respondents did so nullify such proceedings by the practice of misrepresentation and extrinsic or collateral frauds upon said Courts and succeeded thereby in preventing a fair submission of the controversy between petitioner and these respondents. The Trial Justice erred in holding that such practice of misrepresentation and frauds on said Courts is not a violation of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

6) The Trial Justice erred by the inclusion in his decision and judgment of February 11, 1942, the false and fraudulent affidavit of Arthur M. Boal, found at R. fols. 1270-1273 as set forth in R. fols. 1282-1289.

7) The Trial Justice erred in basing his decision and judgment found R. fols. 1270-1273, 1282-1289 upon the null and void proceedings had before Justice Lydon, the Appellate Division, First Department, the New York Court of Appeals in the Harris Case and also the null and void proceedings before the Delaware Court of Chancery.

Questions Presented

There are four main Constitutional questions or claims of Federal right involved and intended to be set forth in this petition.

FIRST: As to res judicata.

(a) It is elementary that the doctrine of res judicata rests at bottom upon the ground that the party to be affected or some other with whom he is in privity has litigated or had an opportunity to litigate the same matter in a former action, in a Court of competent jurisdiction.

(b) It stands admitted on the Record that petitioner (plaintiff in the Court below) was not permitted to be heard either before Justice Lydon or the Appellate Division First Department, or the Court of Appeals or the Delaware Court of Chancery as to his present cause of action, to wit, as a creditor to recover the purchase price paid for certain shares of Class A stock in the C. P. S. Corp. and to establish an equitable lien on the assets transferred on August 1, 1932, in violation of his right.

(c) The value of petitioner's property right is far in excess of \$31,000 if we include taxable costs, costs as between attorney and client and several years' time which petitioner was compelled to devote to the protection of his Constitutional rights.

(d) There is not a particle of evidence in the Record even tending to sustain the defense of res judicata.

(e) By the ruling and decisions of the Supreme Court of New York County, petitioner was deprived of said property right. The question involved is whether it was due process under the Due Process Clause of the Fourteenth Amendment for the New York Supreme Court of New York County to deprive petitioner of said property right.

SECOND: A second Constitutional question or question of Federal right involves the matter of the misrepresentation and frauds practiced by these respondents on Justice Lydon, the Appellate Division, First Department, the New York Court of Appeals in the Harris Case and the Delaware Court of Chancery, by reason of which petitioner (plaintiff in the Court below) was prevented from securing from any of these Courts, a fair submission of his controversy with respondents. These frauds practiced may be divided into several classes: (a) Fraud in the jurisdiction. (b) Extrinsic or collateral fraud practiced on the Court. (c) Judgments which are the fruits of the fraud of respondents. The question to be determined is whether such systematic nullification of judicial proceedings by respondents in said Courts is or is not a violation of the Due Process Clause of the Fourteenth Amendment.

THIRD: A third Constitutional question and a question involving a claim of Federal right is raised by petitioner (plaintiff in the Court below) at R. fols. 676-677-678 and admittedly raised in his reply by petitioner at his earliest opportunity. This question involves the Full Faith and Credit Clause, namely, Article IV, Section 1 of the Federal Constitution.

FOURTH: The facts set forth in Point I raise still another Constitutional question and a question of Federal right but this has already been covered.

III

There are at least seven different grounds and reasons why it follows there is no evidence in the entire record even tending to sustain the defense of res judicata.

1. A comparison of the complaint in the present suit with the complaint in the Harris Case, discloses that the defense of "estoppel by judgment" would be impossible.

FIRST: The parties in the two suits are entirely different. There were five defendants in the Harris Case and two defendants in the present suit.

SECOND: The causes of action as shown in the complaint in the Harris Case are entirely different from the causes of action set forth in the complaint in the present suit. There were some 15 minor causes of action pleaded in the complaint in the Harris Case and only some 2 or 3 causes of action pleaded in the present suit. Moreover, in the present suit there is one cause of action involving 100 shares of Class A stock which was not even included in the Harris Case.

THIRD: The objects of the two suits are entirely different. The main object of the complaint in the Harris Case, while it was to secure a judgment against Consolidated, yet Consolidated being of doubtful financial standing, the main purpose was to establish a secondary liability against the N. W. Harris Company which was a rich, solvent Chicago, Illinois, corporation.

Budniskey v. Arakelian, 268 N. Y. 208-210-211.

FOURTH: These two respondents represented to Justice Lydon from the beginning of the trial until the close, that the cause of action involved as between plaintiff and Consolidated and C. P. U. Corp., was one by plaintiff as a stockholder for "rescission of contracts" (see R. Harris Case, fols. 5-2135, 2656-2699, 3110-3113) while plaintiff asserted throughout the trial (see R. Harris Case, fols. 2392-2398) that this particular cause of action was one by plaintiff as a creditor to recover the purchase price of said shares of stock and to establish an equitable lien on the assets transferred in fraud of his rights on August 1, 1932 and subsequently.

The distinction between (1) a suit by plaintiff as a stockholder for "rescission of contracts" and (2) a suit by plaintiff as a creditor to recover the purchase price of stock and to establish an equitable lien is striking.

A) In the former, the transfer of August 1, 1932, was valid. In the latter, it was void.

Northern Pacific v. Boyd, 228 U. S. 482.

B) In the former, the plaintiff could not attack such a transfer. In the latter, plaintiff could make such attack.

27 Corpus Juris 470.

C) In the former, the C. P. S. Corp. was an indispensable party defendant. In the latter, it was not.

Cobb v. Interstate, 20 Fed (2d), 786.

D) In the former, the matter of relief was discretionary with the Court. In the latter, it was not.

E) In the former, a Court could compel plaintiff to prove his case beyond a doubt. In the latter, a mere preponderance of evidence is sufficient.

18 Encyclopaedia of Pleading and Praetise, 744 at p. 755.

F) Under the doctrine of equity, on the admitted facts, Consolidated assumed and agreed to pay the debts of C. P. S. Corp. including the claim of plaintiff and his assignors.

G) All of the 14 conclusions of law in the Harris Case are drawn on the theory that plaintiff still remained a stockholder of the C. P. S. Corp.

The observations of Mr. Justice Cardozo in *Kittredge v. Langley*, 252 N. Y. 405, 419, go even further. It was there pointed out that it is of no consequence whether or not, as a result of the reorganization, the debtor remains with some property in its hands. The conveyance of the debtor's other property is fraudulent as against existing creditors, so long as the purchaser takes with knowledge, or does not give the equivalent in value, as consideration. The familiar "trust fund" doctrine applied for the protection of creditors explains these rulings.

It is held by this Court in a leading case, namely, *Stark v. Starr*, 94 U. S. 477 at p. 486, that where there are two theories involved in a case:

“A decision upon one could not possibly be a bar to proceedings upon the other, from their intrinsically distinct nature. Having required the complainant to proceed in that suit only upon one cause or ground for relief, the court left the other cause open for any future suit which they might choose to bring.”

Also the same doctrine is held in *Southern Pacific Co. v. Bogert*, 250 U. S. 483, which states the familiar rule:

“There is no reason why a party who failed in an attempt to recover on one theory because unsupported by the facts, should not be permitted to recover on another, for which the facts afford ample basis.”

See also

Larme v. Omnichrome, 275 N. Y. 426-431.

FIFTH: It was asserted by these two respondents and they prevailed upon Justice Lydon to hold that the cause of action pleaded by plaintiff was one as a stockholder for “rescission of contracts” and that it could not be maintained for the reason that an indispensable party defendant, namely, C. P. S. Corp., the seller of the stock had been omitted, therefore, that the Court had no jurisdiction except to dismiss the case for want of jurisdiction. Therefore, the judgment entered could not have been “on the merits”.

SIXTH: Again under the decision of the New York Court of Appeals, namely, *Schuylkill v. Nieberg*, 250 N. Y. 304, there were rights and interests in the Harris Case which were not involved in the suit tried before Mr. Justice McGeehan and there were rights and interests involved in the suit tried before Mr. Justice McGeehan which were not involved in the Harris Case. As stated in the case of

Sielcken v. American, 265 N. Y. 239, bottom of p. 243 and top of p. 244:

"Indeed, in the pending action the plaintiff seeks redress for the transfer of some shares of stock not included within the allegations of the complaint in the California action. The causes of action are, thus, 'different not in form only, but in the rights and interests affected,' and they have not 'such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first'."

While it may be true that the answer of the defendants might be good as a pleading, see *Bell v. Merrifield*, 109 N. Y. 202, yet there was no evidence offered before Mr. Justice McGeehan which changed the law of the case. The authorities speak with one voice in support of this proposition.

See *Shields v. Barrow*, 17 How. U. S. 128, at p. 140 where the Court uses the following language:

"We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

See also:

Pocatello v. Murray, 21 Idaho 193;

Fulton v. Hanlon, 20 Cal. 450;

Barnett v. Smart, 158 Mo. 178, 59 S. W. 235;

Brown v. McKie, 185 N. Y. 303.

In *Pocatello v. Murray*, 226 U. S. 318, paragraphs 4 and 5 of the headnotes are as follows:

"A court which is not empowered to grant relief whatever the merits may be, cannot decide what the

merits are, and a judgment sustaining a demurrer to and dismissing the bill on the ground of such lack of power is not *res judicata* on the merits."

"Where the judgment cannot be *res judicata* on the merits because the court has no power to grant relief, it is not made *res judicata* by reference to the opinion in which the court expresses its views on the merits."

The same rule is laid down in *Donahue v. New York Life*, 259 N. Y. 98-102, which holds that no finding and no conclusion of law has any force or effect as *res judicata* except that it is necessary to a decision of the case.

2. As to the defense of *res judicata* based on estoppel by verdict, there is not a particle of evidence in the record even tending to show that plaintiff's cause of action as a creditor was at any time decided in the Harris Case. On the contrary, Justice Lydon expressly limited himself to the theory that the cause of action involved was one by plaintiff as a stockholder for "rescission of contracts".

As held by this Court in *Russell v. Place*, 94 U. S. 606:

"If upon the face of a record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it where pleaded and nothing conclusive in it when offered in evidence."

The Appellate Division, First Department, as shown by R. Harris Case, fol. 3900, limited itself to the theory adopted by Justice Lydon. The New York Court of Appeals held there was no constitutional question involved and therefore it had no jurisdiction of the appeal in the Harris Case for the reason Justice Lydon and the Appellate Division had held that the cause of action involved was one by plaintiff as a stockholder for "rescission of contracts" while the cause of action pleaded was one by plaintiff as a creditor to recover the purchase price of stock and to establish an equitable lien. Therefore, the latter theory was left untried.

See *Fryberger v. Harris*, 273 N. Y. 115-117.

3. The Plan of Reorganization itself excludes the possibility of sustaining the defense of *res judicata*.

As is held in the case of *Schmid v. Klinck Packing Co., Inc.*, 189 N. Y. S. 543:

"A seller of butter had the right to refuse to recognize the buyer's right to rescind, and to refuse to receive the butter back; but where it dealt with the butter returned, and sold it, such dealing amounted in law to a cancellation of the contract of sale, whether the butter was sold by sample or not, and whether the buyer had the right to return or not."

See also *Brewster v. Wooster*, 131 N. Y. 473.

Moreover, the entire defense of defendants who are respondents in the present suit, was based upon the Plan of Reorganization. The Plan of Reorganization itself excludes the possibility of sustaining the defense of *res judicata*.

The answer cites with approval finding of Justice Lydon No. 106, R. fols. 1084, 1085, reciting Part III of the Plan. Thus the answer of respondents does not even raise an issue.

4. Exhibit 13, which includes the brief of respondents in the Court of Appeals in the Harris Case and also the brief of these respondents in opposition to the granting of a reargument in the Court of Appeals in said Harris Case, offers conclusive proof that the Harris Case was tried by Justice Lydon, and was treated on the appeal by the Appellate Division, First Department, as one by the plaintiff not as a creditor but as a stockholder for rescission of contracts.

We here call attention to the following extracts from the brief of Consolidated:

At page 4 of this brief under the subhead of "Nature of the Action", the following language is used:

"Plaintiff-appellant states in his brief that this is in the nature of a creditor's bill. The case was tried on the theory that it was an action for rescission."

From page 15 of said brief we quote as follows:

"POINT III.

This action is one for rescission and is not a creditor's bill."

At page 17 of said brief, the following language is used:

"POINT IV.

A decree of rescission will not lie against any of the defendants to this action because none of them were vendors of the stock sold or parties to the contracts sought to be rescinded."

At page 20 of said brief, the following language is used:

"The only remedy available to the plaintiff in equity is for rescission, etc."

At page 22 of said brief, the following language is used:

"POINT VII.

"None of the defendants are responsible for any of the liability of Central Public Service Corporation to the plaintiff-appellant."

We now refer to the brief entitled: "Brief in opposition to motion for reargument." This was a brief filed on behalf of all five defendants and respondents in the Harris Case in the Court of Appeals. On page 3 all these respondents, in referring to the decision of Justice Lydon, state:

"The Court ruled, first, that Central Public Service Corporation was a necessary party to determine the issue of rescission, etc."

At page 5 of this brief, the Court used the following language:

"The Court did find and rule that he (plaintiff) had not established a right to rescind the purchase of the stock and was therefore not a creditor of Central Public Service Corporation."

Here we have a formal judicial admission by these two respondents in the Harris Case in the New York Court of Appeals, that the entire proceedings before Justice Lydon including his judgment of October 14, 1935, were and are null and void and subject to collateral attack; also that all the proceedings in the Appellate Division, First Department, including its judgment of July 1, 1936, were and are null and void and subject to collateral attack. Therefore, it follows that the entire proceedings before the New York Court of Appeals including its judgment of January 27, 1937, are also null and void for want of jurisdiction. It also follows as a question of law that if all these proceedings in the Harris Case were null and void, it is axiomatic that the opinion of Chancellor Wolcott of May 25, 1938, in the Delaware Court of Chancery is also null and void and subject to collateral attack because it was based in toto upon the said proceedings in the Harris Case. It therefore follows that all these proceedings being null and void, there is not even a scintilla of evidence in the record tending to sustain the defense of *res judicata*.

5. The entire proceedings in the Delaware Court of Chancery were null and void and subject to collateral attack on several separate grounds.

(a) There was no trial in the Delaware Court. The proceedings went no further than the preliminary stage of pleading. These two respondents demurred to plaintiff's bill of complaint on the ground of *res judicata* and they based the defense in their demurrer upon the proceedings before Mr. Justice Lydon and upon the decision of the New York Court of Appeals. As shown by the Record, these two respondents by their counsel were guilty of misrepresentation and practiced a fraud on Chancellor Wolcott of such a nature that the opinion of Chancellor Wolcott was null and void and subject to collateral attack because the same was simply the fruit of the fraud of these two respondents. As shown by the demurrers interposed by

these two respondents in the Delaware Court of Chancery (found R. this case, fols. 1157, 1165-1166, 1175-1176), these respondents deliberately and intentionally and falsely and fraudulently represented to Chancellor Wolcott that the New York Court of Appeals had actually decided the cause of action of plaintiff as a creditor in the Harris Case, on the merits, when as shown by the records, the New York Court of Appeals dismissed the appeal for want of jurisdiction. Record folios 536-537, 542, 543-545, disclose that Chancellor Wolcott was tricked and deceived thereby. Therefore, there was fraud in the jurisdiction of such a nature as to render the entire proceedings in the Delaware Court null and void and subject to collateral attack. See *Lapiedra v. American Surety Co.*, 247 N. Y. 25; also citing *Mandeville v. Reynolds*, 68 N. Y. 528, 543, holding as follows:

"Fraud and imposition invalidate a judgment as they do all acts, and may be alleged, whenever the party seeks to avail himself of the results of his own fraudulent conduct by setting up the judgment the fruits of his fraud; * * * judgment obtained by fraud upon a court, binds not such court or any other, and its nullity upon that ground though it has not been set aside or reversed, may be alleged in a collateral proceeding (*Webster v. Reid*, 11 How. (U. S. 437; *Cammell v. Newell*, 3 H. & N. 617-646; See 26 N. Y., *Supra*)."

(b) Moreover, as held by the Supreme Court of Delaware in the case of *Allied Chemical & Dye Corp. v. Steel & Tube Co.*, 12 Del. Ch. 368, 127 At. 414, under Rule 79 of the Rules of the Delaware Court of Chancery, which has the force of a statute, a complainant in a Delaware equity suit has the absolute right to dismiss or abandon his suit at any time before the case is called for actual trial and a witness is sworn.

In the case of *Postal Telegraph Company v. City of Newport*, 247 U. S. 464, it was held by this Court as follows (see headnote No. 1):

"This court will review and correct the error of a State Supreme Court in assuming a state of facts without any support in the Record as a basis for denying asserted Federal rights."

At pages 475-476 the following language was used:

"Waiving the doubt whether, under the particular facts of this case, the question of res judicata can be regarded as independent of the federal questions that were raised, we are of the opinion that the decision reached upon it is so clearly ill founded that it cannot sustain the judgment * * *. The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. *Southern Pacific R. R. Co. v. United States*, 168 U. S. 1, 48; *Greenleaf Ev.*, Sections 522-523. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."

This decision is directly in point in the instant case for the reason that it appears that petitioner (as plaintiff in the Court below in the Harris Case) was not given an opportunity to be heard in the matter of litigating the cause of action pleaded, namely, his right as a creditor to recover the purchase price of stock purchased and to establish an equitable lien.

Also the recent case of *Shields v. Utah*, 305 U. S. 177, 182-185, holds that whenever a State Court makes a finding or a ruling or a conclusion of law or a judgment, without any substantial support in the Record, that such finding or ruling or conclusion of law or judgment, as the case may be, is "arbitrary and capricious" and in direct violation of the Due Process Clause of the United States Constitution, for they deprive plaintiff of his property without due process of law.

In the case of *Windsor v. McVeigh*, 93 U. S. 274:

"A sentence of a Court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights and is not entitled to respect in any other tribunal."

Stated differently, this signifies that if a decision of a State Court is for any reason "arbitrary and capricious", that it is extra judicial, null and void.

See also:

Hansberry v. Lee, 311 U. S. 32, 41-45.

On certiorari this Court will examine the record and reverse for legal insufficiency of the evidence.

Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472.

IV

An analysis of the so-called findings of fact found R. fols. 1282-1288 and the so-called conclusions of law found R. fols. 1288-1289, discloses that they are each and all mere baseless conclusions of law which are completely nullified by the real findings of Justice McGeehan found at R. fol. 1291 and by the basic facts of the record as set forth in Point I.

As shown at R. fols. 1270-1273, Arthur M. Boal, counsel for respondents, filed with Mr. Justice McGeehan in January, 1942, his false and fraudulent affidavit sworn to December 15, 1941, in which he stated:

"There is no doubt that the plaintiff instituted a prior suit for the same causes of action in this Court, also in the Chancery Court of Delaware. Both decisions were adverse to him and every issue here involved was there determined.

The findings of fact which the plaintiff has presented are in large part the same ones which were presented to Mr. Justice Lydon and which he refused to make. Mr. Justice Lydon found that none of the allegations of fraud had been proved, the causes of action alleged had not been proved, and there was no basis for a rescission in fact or a rescission by decree."

We have already shown that these statements are utterly baseless and false and contrary to the undisputed evidence in the record. In addition we now refer to three additional findings made by Mr. Justice Lydon which nullify this affidavit of Mr. Boal. At R. fol. 386 in paragraph 94 of his findings, Justice Lydon uses the following language:

"That W. G. Schanke and Co., although they knew that the market for said Class A stock was being supported, did not disclose to the said Helen Fryberger the fact that the said market was a supported market."

In paragraph 95, R. fols. 388-389, Justice Lydon made the following findings:

"During said negotiations, W. G. Schanke and Co. did not disclose to the plaintiff the fact that the marketing of said Class A stock was being supported by the Central Public Service Corp."

And again, in paragraph 97 of his findings, R. fol. 393, Justice Lydon makes a similar finding as to Mrs. Clara F. Johnson.

As held in the case of *Seneca v. Leach*, 247 N. Y. page 1, this finding of failure to disclose is a finding of fraud of such a nature that plaintiff and his assignors were justified in serving notice of rescission just as they did. Nevertheless, Mr. Justice McGeehan was misled and subsequently he actually incorporated the substance of this false affidavit into his decision, and he proceeded to sign the alleged findings of fact found at R. fols. 1282-1288 and the conclusions of law I, II and III found at fols. 1288-1289. In paragraph 1 it is stated:

"In his decision Mr. Justice Lydon made one hundred sixteen findings of fact and fourteen conclusions of law and dismissed the complaint *on its merits*."

Finding No. 6 is as follows:

"All the pertinent issues in the prior suit in this Court were decided adversely to the plaintiff; that is, it was decreed that he had failed to establish a right to a rescission of his purchase of the Class A stock of Central Public Service Corporation."

Finding No. 7 is as follows:

"Plaintiff then instituted a suit in the Chancery Court of the State of Delaware in which he made the same allegations, namely: that he had been induced to purchase this Class A stock of Central Public Service Corporation by fraud; that he had in fact rescinded the purchases, and was entitled to a lien on the assets of these defendants, which he claimed, had been transferred to them by Central Public Service Corporation. The Chancellor of the State of Delaware in a considered opinion held that the *issues involved in the New York suit were the same as those involved in the Delaware suit*; that these issues had been decided adversely to the plaintiff, and were a bar to the Delaware suit."

Finding No. 8 is as follows:

"Plaintiff offered in this case no evidence that was not before Mr. Justice Lydon in the prior suit in this court."

The conclusions of law are as follows:

I.

"The issues involved in this suit have all been decided adversely to the plaintiff in the prior suit in the Supreme Court of the State of New York and the suit instituted in the Chancery court of the State of Delaware, and are a bar to this action."

II.

"Plaintiff is estopped from trying a second time the issues decided against him in the prior suit in this Court."

III.

"Plaintiff is estopped from trying here the issues decided against him in the Chancery Court of the State of Delaware."

There are three answers which we desire to summarize. First: Justice McGeehan by his findings, found R. fol. 1291, completely discredited and nullified the statements contained in paragraphs 1, 6, 7 and 8 and conclusions of law I, II and III. Second: They are each and all discredited by the record to which we have referred. Third: These so-called findings are not findings at all but they are simply baseless conclusions of law or as to certain ones it might be said that they are baseless mixed questions of law and fact.

As stated by Simpkins Federal Practice, 1938 Ed., Section 963, page 684:

"Ordinarily, findings of fact by state courts will not be questioned by the Supreme Court. But to this general rule there are two equally well-settled exceptions: (1) Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; and (2) where a conclusion of law as to a Federal right and finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal questions, to analyze the facts."

Also see cases in the notes.

As held by this Court in *Erie v. Purdy*, 185 U. S. 148-150, the question whether a claim of Federal right as presented is itself a Federal question and if properly raised in the court of first instance, example, the New York Supreme Court of New York County, it is not material if the New

York Court of Appeals refuses to pass on the constitutional question. That this Court will search the record in order to discover whether a constitutional question or a question of Federal right was duly claimed and will analyze alleged findings of fact in order to determine whether they are really conclusions of law.

First National Bank v. Anderson, 269 U. S. 341.

See:

Truax v. Corregan, 257 U. S. 312-324;
United States v. Pink, 315 U. S. 203-256;
Carlson v. Curtiss, 234 U. S. 103-106;
Norfolk v. West Va., 236 U. S. 605-610 (Justice Murphy *Ex parte Hull*, 312 U. S. 546);
Carter v. Texas, 177 U. S. 442-447.

A question under the Full Faith and Credit provision of the Federal Constitution is a Federal question and such conclusion is not "open to doubt".

See:

In re Hanrahan's Will, 109 Vermont 108, 194 At. 473-6;
Brown v. Fletcher, 210 U. S. 82.

In *Riley v. New York Trust Co.*, 315 U. S. 343, it was held:

"By the Constitutional provision for full faith and credit, the local doctrines of *res judicata*, speaking generally, become a part of national jurisprudence."

On February 11, 1942, judgment was entered for the defendants, R. fols. 1294-1299. The notice of appeal to the Appellate Division, R. fols. 4-7, discloses that not only the judgment of February 11, 1942, but the order of January 14, 1942, were brought up for review. As shown by fols. 1339-1342, the Appellate Division entered an order of

affirmance on appeal from the judgment and order and the judgment of affirmance is found R. fols. 1343-1348. As shown by R. fols. 1333-1336, a notice of appeal from the judgment of January 21, 1943, also brought up for review the order and judgment of the Appellate Division affirming the order of January 14, 1942.

V

The record establishes that respondents practiced misrepresentation and extrinsic or collateral fraud upon Mr. Justice Lydon, the Appellate Division, First Department, and the New York Court of Appeals in the Harris Case; upon Chancellor Wolcott in the Delaware Court of Chancery and upon Mr. Justice McGeehan, the Appellate Division, First Department, and the New York Court of Appeals in the present suit, to such an extent that all the proceedings in the Harris Case and Delaware Court of Chancery and the judgments of Justice McGeehan, his order of January 14, 1942, the judgment of the Appellate Division, First Department, and the New York Court of Appeals are all null and void and subject to collateral attack.

This is true for the following reasons: said judgments are the fruits of the frauds of these respondents.

In the case of *Marine v. Hodgson*, 7 Cranch. 332-336, Chief Justice Marshall in describing and defining just what is meant by a judgment obtained or procured by fraud stated:

"The judgment must be one of which it would be against conscience for the person who has obtained it to avail himself."

In *Dobson v. Pearce*, 12 N. Y. 156, the rule is stated as follows:

"Fraud and imposition invalidate a judgment as they do all acts; and the fraud may be alleged when-

ever the party seeks to avail himself of the results of his own fraudulent conduct by setting up the judgment, the fruits of his fraud."

In the case of *United States v. Throckmorton*, 98 U. S., p. 61, paragraphs 2 and 3 of the headnotes are as follows:

"The frauds for which a bill to set aside a judgment or a decree between the same parties, rendered by a court of competent jurisdiction, will be sustained, are those which are extrinsic or collateral to the matter tried, and not a fraud which was in issue in the former suit."

"The cases where such relief has been granted are those in which, by fraud or deception practiced on the unsuccessful party, he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court of the subject-matter of the suit."

In the case of *Wyman v. Newhouse*, 93 Féd. (2d) 313, which was sustained on certiorari by the Federal Supreme Court in 303 U. S. 664, it is held that a fraud affecting the jurisdiction, is the equivalent of a lack of jurisdiction. For the purposes of jurisdiction as herein referred to, there are three elements: (1) jurisdiction of the person, (2) jurisdiction of the subject matter, (3) jurisdiction to enter the particular judgment in question. Jurisdiction of the person is not involved in a discussion of this particular issue but jurisdiction of the subject matter is involved. Also jurisdiction to enter the particular judgment is also involved.

See also:

34 C. J., p. 565, Secs. 866-868.

The clearest definition we have found of the term "extrinsic or collateral fraud" is found in *Garrett v. Minard*, 82 Kansas 388, 108 Pacific 80, as follows:

"By extrinsic or collateral fraud for which a court of equity will set aside a judgment rendered by a court of competent jurisdiction, is meant some act or conduct

of the prevailing party which has prevented a fair submission of the controversy."

The subject of extrinsic or collateral fraud, especially in very recent years has become a vast special field of jurisprudence. Today, almost every state, every jurisdiction in the United States has accepted the definition of extrinsic or collateral fraud as set forth in the case of *Garrett v. Minard*, 82 Kansas 388, 108 Pac. 80.

In Volume II, Pomeroy's Equity Jurisprudence, Section 919, it is stated that all instances of this kind must be regarded as a fraud on the Court. A very exhaustive collection of the recent cases on this subject is found in 31 American Jurisprudence under the head of "Judgments" at Section 654.

Petitioner respectfully submits that it is the doctrine of extrinsic or collateral fraud which is at the foundation of the rule adopted by this Court as set forth in *Simpkins Federal Practice* 1938 at Section 963.

As Freeman on Judgments, 5th Ed. states at Section 1233, extrinsic fraud consists not of fraud in a cause of action but in the management of the case. The Record shows that these respondents by their misconduct, prevented Justice Lydon, the Appellate Division, First Department, the New York Court of Appeals, the Delaware Court of Chancery in the Harris Case and also prevented Mr. Justice McGeehan, the Appellate Division, First Department and the New York Court of Appeals in the present suit from passing on the merits of the present cause of action.

See also 34 C. J. 471, 472, 473, Sections 739, 740, 741, and especially see Annotations for Corpus Juris for years 1940, 1941, 1942 and 1943.

Stade v. Stade, 315 Ill. App. 136 (Ill.);
Harjo v. Johnston, 104 Pac. 2nd 985 (Okl.);
Scott v. Dilko, 117 Pac. 2nd 700 (Cal. App.);
Mills v. Baird, 147 S. W. 2nd 312 (Texas);
Farley v. Davis, 116 Pac. 2nd 263 (Wash.).

VI

The main question left to consider is whether or not the plaintiff in the court below claimed the federal right above referred to or raised the constitutional question in a proper and timely manner. If he did, petitioner is entitled to have his petition granted.

It is well settled under the decisions of the New York Court of Appeals which is the highest Court in the State of New York, that a Constitutional question should be raised at the earliest opportunity or in any event at a time such that the trial Justice shall have the opportunity to correct his ruling while the matter is still under his control.

Matter of Pet., 98 N. Y. 447-452;
Cowenhoven v. Ball, 118 N. Y. 231-235;
Dodge v. Cornelius, 168 N. Y. 242;
People v. Houghton, 182 N. Y. 301-304;
Purdy v. Erie, 162 N. Y. 42;
Erie v. Purdy, 185 U. S. 148-150.

It is also well-settled by the decisions of the New York Court of Appeals that there are at least three methods by which a party aggrieved may raise a Constitutional question: (1) If a ruling of the Court is made on the trial of the case in a Court of first instance, that an objection and exception should be made and taken at the time. (2) That if a ruling is made by the Court of first instance, for example after the trial is adjourned, that the Constitutional question may be raised by motion.

Matter of Buffalo, 78 N. Y. 362;
In re Department, 85 N. Y. 301;
In re U. S., 66 How. Prac. 517;
Youngs v. Goodman, 240 N. Y. 470-473;
Bannon v. Bannon, 270 N. Y. 484-489;
Gleason v. Thompson, 245 N. Y. 509.

(3) In a proper case, a Constitutional question may be raised by the pleadings.

In the instant case, the first time petitioner (plaintiff in the Court below) had notice that respondents were intending to raise the defense of res judicata, was when their answer was filed January 23, 1939 (see R. fol. 103).

As shown by paragraph 7 of the reply at R. fols. 671-672, plaintiff made the claim that upon the undisputed evidence as shown by the Record in the Harris Case, the defense of res judicata would be impossible. We quote:

"That as shown in R. Harris Case, fols. 5 to 12, Mr. Justice Lydon held that the Harris Case was an action in equity for rescission of contracts and at folio 12 he said:—

'Even if these disputed facts were found in plaintiff's favor he could not succeed in the present action. I have therefore refused the requests for findings of both sides on the issue of fraud or falsity in the representations made to plaintiff and his assignors. (Since the Central Public Service Corporation is not a party to the action.)', etc."

And on appeal to the Appellate Division, the Appellate Division in their decision (found in R. Harris Case, fol. 3900) used the following language in describing the Harris Case:

"Action for rescission of contracts."

As shown by paragraph 8 of the reply, R. fols. 675-676 et seq., plaintiff pleaded Article IV, Section 1 of the United States Constitution as follows:

"Full faith and credit shall be given in each state to the public Acts, Records and judicial proceedings of every other state. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof."

Under the decisions of this court, if the judgment of Justice Lydon in the Harris Case was not "on the merits" then the opinion of the Delaware Court of Chancery must also treat the New York judgment as not on the merits, and in paragraph 10 of the reply, R. fols. 6(a) 1, 2 and 3, it is charged that respondents had taken advantage of the mortal illness of Chancellor Wolcott to practice a fraud upon the Court. The death of Chancellor Wolcott occurred November 8, 1938. As shown by R. fols. 934-935, when on July 8, 1938 it was called to the Chancellor's attention that there was no foundation for his opinion:

"A. His face was red as fire, and he turned to Mr. Boal, who sat over across the table from me, and shook his head, and he said, 'This must be made right; this must be corrected. Now,' he says, 'I have been misinformed.' He said, 'Mr. Fryberger, I have never looked at the pleadings. I have never seen the pleadings. I have never seen the record in the New York suit; nothing at all.' He said, 'I have been misinformed.' And Mr. Boal's face was red indeed and he looked down at the floor and he did not look up at Chancellor Wolcott."

Almost immediately after June 30, 1941, Justice McGeehan left the jurisdiction and remained away from New York County until the latter part of the year 1941 and as shown by R. fols. 1132-1152, plaintiff as of the date December 9, 1941 served a notice of motion returnable December 16, 1941 in which motion he moved to vacate the memorandum decision of June 30, 1941 on the ground that this decision "deprived plaintiff of his property without due process of law and in violation of the Fourteenth Amendment of the United States Constitution and deprived plaintiff of his right to his day in Court on the questions involved in the action". Attached to the notice of motion is found the affidavit of the plaintiff (R. 1137-1152) and for instance, as shown by paragraph 7 of said affidavit, one of the chief grounds of the motion is:

"There is no evidence in the Record which even tends to sustain the defense of estoppel by judgment or the defense of estoppel by verdict."

And paragraph 10 of said affidavit is as follows:

"Deponent alleges that a Constitutional question is necessarily involved in said memorandum decision for the reason that the foundation of the doctrine of res judicata, or estoppel by judgment, is that both parties have had their day in Court. Said ruling therefore directly involves such Constitutional question. According to the understanding of deponent, he has no discretion, but is required to raise such Constitutional question now, or subject himself to the claim of waiver."

As shown by R. pages 425, 426 and 427, Justice McGeehan on January 14, 1942, filed a memorandum decision in which he denied the motion of December 9, 1941 in all respects.

As shown by R. fol. 1291, Justice McGeehan on January 12, 1942, made the following findings:

"Except as incorporated in the defendants' Findings and Conclusions signed herewith and the items as 'Found' by Mr. Justice Lydon, all of the items contained in the plaintiff's submitted Findings and Conclusions are marked 'Refused' in accordance with the disposition made by this Court."

The effect of this finding was to make sweeping findings in favor of the plaintiff covering every issue of fact in the case.

If Justice McGeehan had stopped at that point, petitioner (plaintiff) would have been entitled to the entire relief which he sought in his complaint.

While the 116 alleged findings and 14 conclusions of law of Justice Lydon were null and void and could not be res judicata of anything, yet as shown by R. fols. 1189-1251, plaintiff made a motion before Justice McGeehan requesting him to make some 37 findings of fact and some 9 conclusions of law. These proposed findings were based upon

undisputed facts in the record. In response thereto, Justice McGeehan adopted all the basic facts found by Justice Lydon in favor of the plaintiff. And although these former findings of Justice Lydon were null and void, yet they were galvanized into life by these findings of Justice McGeehan found at R. fol. 1291 hereinbefore referred to.

We have already set forth references to the record which disclose that the constitutional question and claim of Federal right were duly set forth and presented to the Supreme Court of New York County, its denial by the Supreme Court of New York County, that the order of denial was duly presented for review to the Appellate Division, First Department, of denial, the appeal from this judgment to the New York Court of Appeals and its dismissal by the Court of Appeals solely on the ground that it believed that a constitutional question is not directly involved within the limit of meaning of its governing statute, C. P. A., Sec. 588, 1a, as interpreted by many authorities in that Court.

In the application of plaintiff to the Appellate Division, First Department, for leave to appeal, virtually the same matters were discussed concerning the constitutional question as are presented at this time. The Appellate Division, First Department, denied permission to appeal. Thereupon, petitioner (plaintiff in the Court below) prepared an elaborate printed affidavit and brief and an application to the Court of Appeals for leave to appeal and as shown by this printed application on file with the Clerk of the New York Court of Appeals, all these same grounds set forth why the constitutional question was involved, were presented. Thereupon, the Court of Appeals entered an order denying petitioner (plaintiff) permission to appeal.

In a word, in all these New York State Courts, petitioner's position has been the same as to one proposition namely, that the decision of the New York Supreme Court for one reason denies to plaintiff (this petitioner) his constitutional rights because, in sustaining the defense of res judicata without a particle of evidence to support it denies to petitioner (plaintiff) his day in court.

In addition, the charge that these two respondents were guilty of extrinsic or collateral fraud to such an extent that all seven judgments of all seven New York State Courts were null and void and subject to collateral attack was duly presented in all said New York State Courts.*

VII

Reasons relied upon for the allowance of the writ.

1. The Court below has decided a Federal question of substance in a way which is not in accord with the applicable decisions of this Court. It is believed that there are not less than 100 decisions of this Court, many of them recent decisions, which are directly in point and which hold in principle that a constitutional question of substance was set up by petitioner in the Court below but was denied or not given due recognition; that a claim of Federal right was properly set up by petitioner but was denied and not given due recognition, and that petitioner was and is entitled to invoke the jurisdiction of this Court on certiorari in order to determine such question and also determine whether the right was denied in direct terms or in substance and in fact.

* Petitioner's "Assignments of error", the subdivision "Questions presented" and "Reasons relied upon for the allowance of the writ", in connection with his seven points, present quite a complete presentation of his position. Special attention is hereby called to petitioner's motion for leave to renew upon new and additional papers, the motion made by plaintiff for judgment at the conclusions of the trial in June, 1941. Under New York practice, the order denying this motion is appealable.

Carmody, Vol. VI, Sec. 34;

Seletsky v. Third Avenue, 44 App. Div. 632.

The matters contained in "Record on appeal", pp. 4-433 inclusive, were called to the attention not only of Mr. Justice McGeehan but also to the Appellate Division, First Department, and the New York Court of Appeals on motions for leave to appeal as well as on appeal.

2. Petitioner respectfully shows that the decisions, rulings, conclusions of law and judgments of the New York State Courts were and are illegal, subversive in the extreme and violative of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution and of the Full Faith and Credit Clause of the Federal Constitution, and petitioner has been unable to discover any comparable instance anywhere in the jurisprudence of the United States since the adoption of the Federal Constitution in 1789, where the violation of the Federal Constitution and the violation of Federal right has been so acute or so pronounced and which has extended continuously over a period of nearly ten years.

3. That petitioner has been unable to find any other instance or case where for a period of ten consecutive years the respondents have practiced an extrinsic or collateral fraud upon judges of the New York State Courts and upon the Chancery Court of Delaware, the said judges embracing seven different courts and in this manner have made use of legal proceedings to injure petitioner and to prevent him from securing a fair submission of the controversy between the litigants.

In the case of *Verplanck v. Van Buren*, 76 N. Y. 247, it is held:

"Where parties, in pursuance of a conspiracy or combination for that purpose, fraudulently make use of legal proceedings to injure another, an action lies against them at the suit of the person injured to recover the damages sustained."

It appears by the Record that petitioner is a member of a class of more than 50,000 potential claimants, whose claims aggregate some \$78,000,000. A denial of the petition would probably and almost necessarily signify a denial of a very large percentage of these 50,000 claims by the granting of the petition would not at all necessarily signify the allowance of any of the claims of the said 50,000 claimants, for reasons set forth in Point I.

As held by *Hillyer v. LeRoy*, 179 N. Y. 369, petitioner is entitled to an equitable lien which takes effect as of August 1, 1932 and is prior to the subsequent bankruptcy proceedings and also prior to the claims of subsequent bondholders.

4. The value of the property rights of petitioner of which he has been deprived by the decisions, rulings alleged findings, alleged conclusions of law and judgments, is in excess of \$31,000 not including taxable costs or costs as between attorney and client which are allowable in a typical creditor's bill such as this. That if actual expenses such as the printing of briefs and records, traveling expenses, attorneys' fees paid to other attorneys, were included, the property right in question would amount in value to far in excess of the \$31,000. But in addition, petitioner has been compelled to devote more than five years of actual time during the entire ten year period, in defending himself from these extrinsic and collateral frauds above described. As we have already shown, there is not the slightest dispute in the Record but that these extrinsic, collateral frauds have been committed by respondents and that not only their local counsel but their general counsel have participated in the same. Obviously even the sum of \$31,000 is not trivial and it is a sum petitioner cannot afford to lose and for the stronger reason, he cannot afford to lose the amounts of the subsequent items. It is not worth while to discuss the details of these latter items because they will be considered and proven in subsequent proceedings in the Court below. But the loss of all these items, great as they are, in the opinion of petitioner are even less serious than would be the endorsement or approval of a \$78,000,000 swindle or the approval of the frauds upon the State Courts that have been practiced in this case, each one of which is a violation of the Due Process Clause of the Fourteenth Amendment.

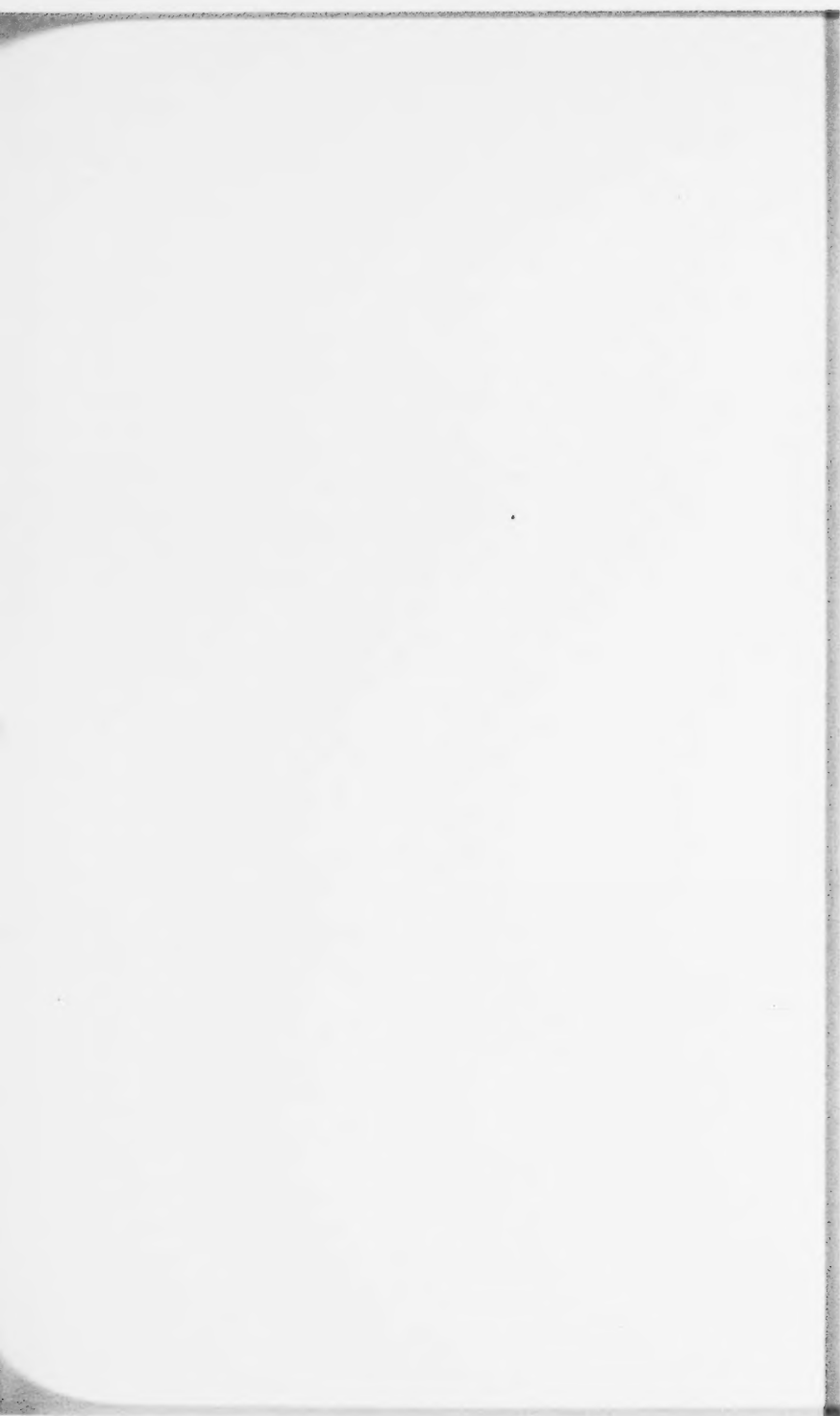
5. The data as to the number of stockholders of C. P. S. Corp. and the general locality of their residence is set forth at page 11 of the C. P. S. Corp. Annual Report for the year 1931 as follows:

Number of Stockholders—Total.....	76,328
Eastern United States	16,583
Western United States	20,359
Southern United States	11,230
North Central United States	27,645
United States Possessions	37
Foreign	474

No claim is made by petitioner that the claims of any claimant, except that of petitioner, is up for review in this proceeding. The only purpose of referring to the data just cited is that it might possibly throw some light upon the importance of allowing the writ.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the New York Supreme Court of New York County in the State of New York to the end that the judgment of said New York Supreme Court may be reviewed and reversed by this honorable Court.

HARRISON E. FRYBERGER,
Counsel for Petitioner.





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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

HARRISON E. FRYBERGER,
Plaintiff-Appellant,

against

CONSOLIDATED ELECTRIC & GAS COMPANY, a corporation organized and existing under the laws of Delaware, and CENTRAL PUBLIC UTILITY CORPORATION, a corporation organized and existing under the laws of Delaware,

Defendants-Respondents.

October Term
1943

No. 439

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

In opposition to the petition for a writ of certiorari, and in reply thereto, respondents, Consolidated Electric and Gas Corporation and Central Public Utility Corporation, respectfully show:

Statement of Facts.

The Plaintiff and his assignors allege that they purchased certain shares of the Class "A" stock of Central Public Service Corporation, a Maryland public utility holding corporation; that they were induced to make these purchases because of false representations made to them by the Central Public Service Corporation and seek

to recover the full purchase price paid for the shares. The Plaintiff first brought a suit in equity in the Supreme Court of the State of New York on or about the 3rd of November, 1933. In that case he sought either a decree for the rescission of the purchase of said shares, or the establishment of his right to recover based upon a rescission in fact. That case was tried before Mr. Justice Lydon without a jury. The trial began on April 22nd and was concluded on May 3, 1935. The Court took the case under advisement and after receiving briefs from both sides made 116 Findings of Fact and 14 Conclusions of Law. Judgment was entered dismissing the complaint on its merits. The respondents were parties to that suit along with three other defendants. One of the important conclusions of law adopted by Mr. Justice Lydon is No. 9 (Rec. 140, fol. 419).

“Plaintiff has not sustained the burden of proving that any of the representations made to him were false.”

That effectually disposed of the plaintiff's claim of a rescission in fact or a right to a decree for rescission. From that judgment dismissing the complaint, the plaintiff appealed to the Appellate Division. That Court affirmed the judgment without opinion. An appeal was taken to the Court of Appeals and that Court dismissed the appeal with an opinion (Rec. 147-150) 273 N. Y. 115.

In the course of its opinion the Court said:

“The gist of his claim is that the judgment granted by the Special Term and unanimously affirmed by the Appellate Division is wrong, and that he has been deprived of his property without due process of law. We are unable to see that there is any constitutional question directly involved on this appeal. Appellant has had his day in court; has had a trial lasting about

nine days, and all issues which the court deemed relevant under the applicable rules of law have been decided by the court in a decision which contains over a hundred findings of fact.

‘It is firmly established that when parties have been fully heard in the regular course of judicial proceedings an erroneous decision of the State court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States.’ ”

The petitioner then filed a suit in the Chancery Court of the State of Delaware to recover the purchase price of these same shares and annexed to that complaint a copy of the Record in the first New York suit. The Respondents demurred to the complaint and the demurrer was sustained. The Chancellor said, after reviewing the law on *res adjudicata* (Rec. 181-182)

“These principles govern the facts shown here. What are those facts? They are that the complainant filed a suit in equity against Consolidated and Public Utility among others, charging the same identical fraudulent representations as are here charged as having been made to him by Public Service as an inducement to him to purchase the same stock as is here involved, the same repudiation by him of his status as a stockholder and the acquisition by him of the status of a creditor, the same liability of the defendants to respond to him for his claim for deceit practiced against him by Public Service, and the same liability of the defendants’ assets to be burdened with an equitable lien in his favor. The pleadings in the New York case, the evidence adduced at the trial, the court’s findings of fact and law (one hundred and sixteen of the former and fourteen of

the latter), and the decision dismissing the bill after a hearing on the merits are all before this court. They show the complaint there made is identical with the one here made. The opinion of the Court of Appeals found reported in 273 N. Y. 115, describes the bill in New York as one which 'demands an equitable lien on the assets so transferred', which is exactly the demand here made in one of its phrasings.

"After a full and extensive hearing at which a large volume of testimony was taken, the trial court found against the complainant on the fundamental issues. It found that no false representations had been made, that the complainant in his purchases placed no reliance on any representations and that there was no competent evidence to sustain the complainant's theory that Consolidated and Public Utility should respond to the complainant on account of any obligation which the complainant could have enforced against Public Service. The bill was accordingly dismissed. The decree of dismissal was affirmed on appeal. The decree makes brief reference to the court's statement of the facts found and the conclusions of law thereon, and then formally dismisses the bill. Recourse may be had to the formal pleadings, to the issues framed or even to parol evidence, when necessary, to show what questions were submitted and necessarily passed upon by the court in rendering its judgment. *Venetsanos v. Pappas*, supra. It is necessary in this case to refer only to the court's findings of fact and conclusions of law and the decree based thereon, to show very convincingly that what the complainant here seeks to litigate against Consolidated and Public Utility has been fully heard and determined against him elsewhere by a court of competent jurisdiction."

The plaintiff then started this suit against these same respondents in the Supreme Court of New York County.

After trial the Court entered judgment dismissing the complaint. The Court sustained the defense of *res adjudicata* and then adopted all the findings of fact and conclusions of law made by Mr. Justice Lydon in the first New York suit.

As to the defense of *res adjudicata*, the Court said (Rec. 376):

"It appears that this litigation raises issues that have been adjudicated and this court is constrained to adhere under the prevailing circumstances to such adjudication. The specific issues raised herein appear to be within the purview of the prior adjudication and this action appears to be tantamount to allowing a new trial as against these defendants after such an application made on behalf of the plaintiff for a new trial has been judically determined and denied, and this disposition among other matters has been reviewed and affirmed on appeal. Judgment is accordingly awarded to the defendants dismissing the complaint herein."

Mr. Justice McGeehan made the following Findings of Fact and Conclusions of Law (Rec. 428-430):

FINDINGS OF FACT.

1. Plaintiff in this action instituted another suit against these defendants and others in the Supreme Court of the State of New York in November, 1933. That case was tried before Mr. Justice Lydon without a jury, commencing on April 22, 1935. It was concluded on May 2, 1935. In his decision Mr. Justice Lydon made one hundred sixteen findings of fact and fourteen conclusions of law and dismissed the complaint on its merits.

2. Plaintiff made a motion for a new trial and that motion was denied.

3. Plaintiff appealed to the Appellate Division and the Appellate Division affirmed both the judgment and the order denying a new trial.

4. Plaintiff then took an appeal as a matter of right to the Court of Appeals and that Court dismissed the appeal.

5. In the prior suit in the Supreme Court plaintiff alleged he and his assignors had been induced to purchase certain shares of the Class A Preferred stock of Central Public Service Corporation by false and fraudulent representations; that he had tendered back the stock and had asked for either a decree of rescission or a decree that he had rescinded in fact, and was entitled to an equitable lien on the assets of Central Public Service Corporation which, he alleged, had been transferred to these defendants.

6. All the pertinent issues in the prior suit in this Court were decided adversely to the plaintiff; that is, it was decreed that he had failed to establish a right to a rescission of his purchase of the Class A stock of Central Public Service Corporation.

7. Plaintiff then instituted a suit in the Chancery Court of the State of Delaware in which he made the same allegations, namely: that he had been induced to purchase this Class A stock of Central Public Service Corporation by fraud; that he had in fact rescinded the purchases, and was entitled to a lien on the assets of these defendants, which, he claimed, had been transferred to them by Central Public Service Corporation. The Chancellor of the State of Delaware in a considered opinion held that the issues involved in the New York suit were the same as those involved in the Delaware suit; that these issues had been decided adversely to the plaintiff, and were a bar to the Delaware suit.

8. Plaintiff offered in this case no evidence that was not before Mr. Justice Lydon in the prior suit in this Court.

CONCLUSIONS OF LAW.

I.

The issues involved in this suit have all been decided adversely to the plaintiff in the prior suit in the Supreme Court of the State of New York and the suit instituted in the Chancery Court of the State of Delaware, and are a bar to this action.

II.

Plaintiff is estopped from trying a second time the issues decided against him in the prior suit in this Court.

III.

Plaintiff is estopped from trying here the issues decided against him in the Chancery Court of the State of Delaware.

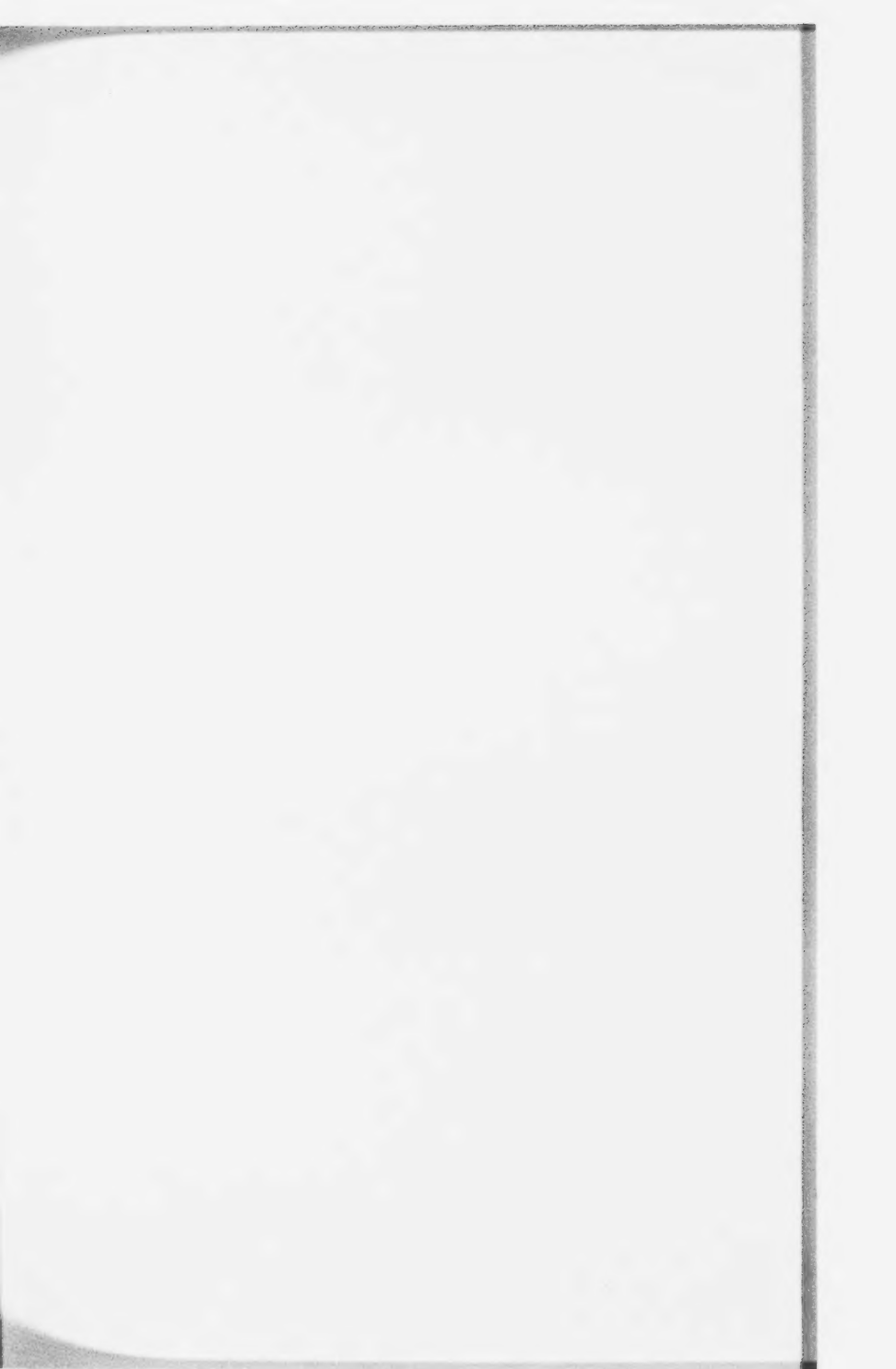
I therefore direct judgment to be entered in favor of the defendants, Consolidated Electric and Gas Company and Central Public Utility Corporation, and each of them, against the plaintiff, Harris E. Fryberger, dismissing the complaint of the plaintiff as against said defendants, and each of them, with costs to the said defendants to be taxed.

This judgment was affirmed on appeal by the Appellate Division and leave to appeal to the Court of Appeals was denied both by the Appellate Division and the Court of Appeals. Nevertheless an appeal was taken to the Court of Appeals as a matter of right but that appeal was dismissed after argument.

The decision of the Supreme Court of the State of New York involved only questions of law and the application of the rule of *res adjudicata*. The judgment was correct on all issues. All three suits instituted by the petitioner were for the same cause of action, involved the same issues of law and fact, and the respondents were parties defendant in all three suits. The causes of action were merged in the judgments and the petitioner is estopped from litigating again the issues so decided against him.

It is clear that there is involved in this case no question of public importance, no constitutional question and no Federal question. It is respectfully submitted that the petition should be denied.

ARTHUR M. BOAL,
Counsel for Petitioner,
116 John Street,
Borough of Manhattan,
City of New York.





129

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Supreme Court of the United States

OCTOBER TERM 1943

No. 439

HARRISON E. FRYBERGER,

Plaintiff-Appellant,

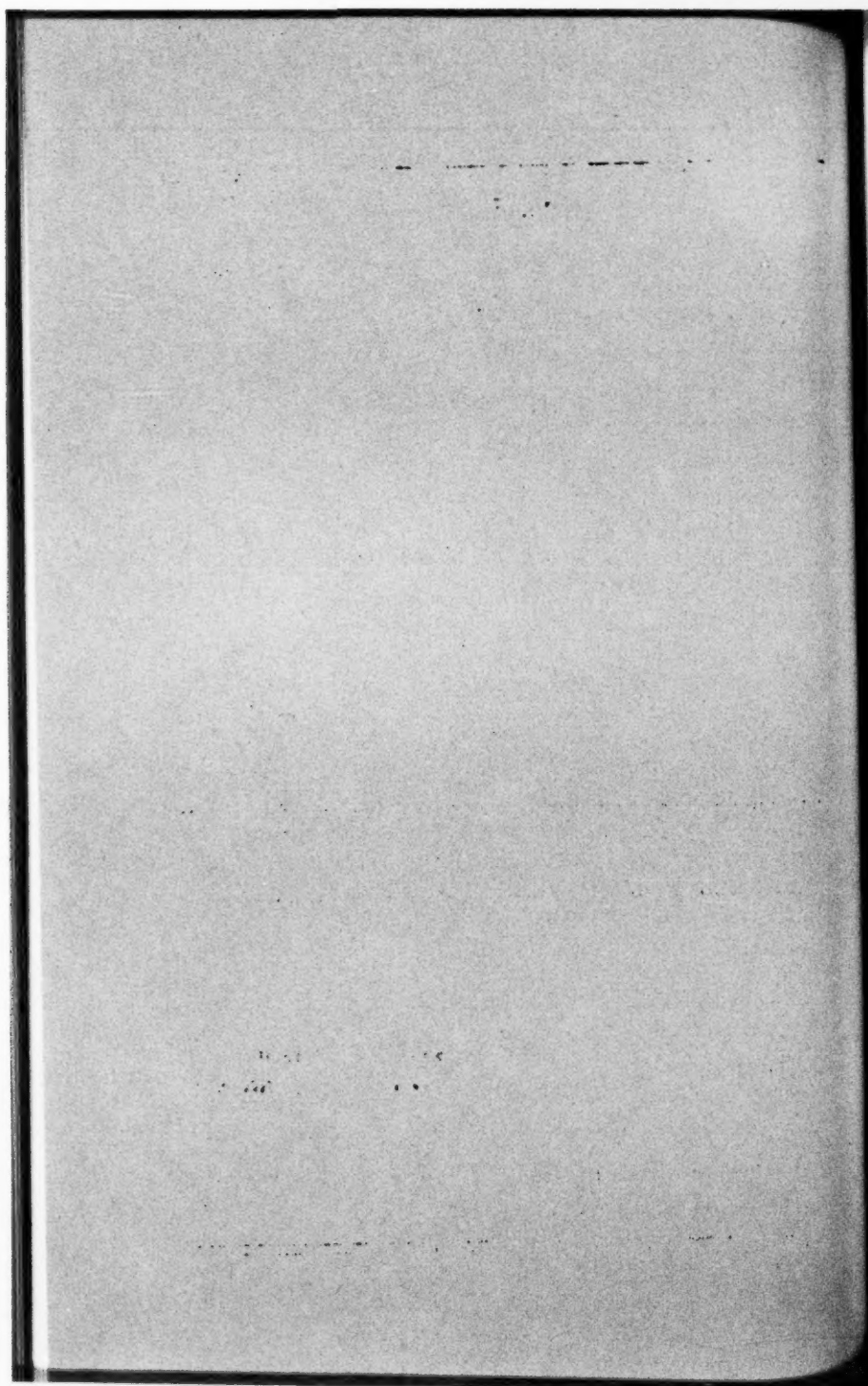
against

CONSOLIDATED ELECTRIC & GAS COMPANY, a corporation organized and existing under the laws of Delaware, and
CENTRAL PUBLIC UTILITY CORPORATION, a corporation organized and existing under the laws of Delaware,
Defendants-Respondents.

PETITIONER'S REPLY BRIEF

HARRISON E. FRYBERGER,

Counsel for Petitioner.



INDEX

	PAGE
I—We respectfully submit that the granting of a writ in this proceeding by this Court is not a matter within its entire discretion.....	8
II—We respectfully ask whether this Court does possess <i>jurisdiction</i> to deny a writ to petitioner.....	10
III—The New York State Courts were and are seeking to protect certain powerful business interests of certain residents of New York City at the expense of the residents of the forty-seven states not including New York.....	10
IV—The record in the Harris Case discloses that the issues as set forth in petitioner's book "Abolition of Poverty" published in August, 1931, the issues of the 1932 campaign as set forth in the Democratic Platform of 1932 and the basic principles of the Federal Statute of June 6, 1934, creating the Securities and Exchange Commission, of the contents of which this Court will take judicial notice, are not merely interrelated but they are inseparable and in effect all three documents denounce the attempt of respondents (a) to prevent petitioner from having his day in court, (b) the attempt on the part of certain residents of New York City to practice a \$78,000,000 swindle on the residents of the other forty-seven states, (c) the attempt by respondents to practice misrepresentation and fraud on various New York State Courts and the Chancery Court of Delaware.....	12
V—A constructive suggestion.....	15
APPENDIX	17

CASES CITED

	PAGE
Backus v. Finkelstein, 23 Fed. (2d) 357.....	12
Brinkerhoff v. Hill, 281 U. S. 673-682.....	8, 9
Cole v. Millerton, 133 N. Y. 164-168.....	8
First National v. Frankel, 235 App. Div. 96 (N. Y.).....	4
Fryberger v. Harris, 273 N. Y. 115.....	4
Hurd v. Steam Laundry, 167 N. Y. 89.....	8
Interstate Commerce v. Louisville, 227 U. S. 88-91.....	9
Morgan v. U. S., 298 U. S. 38-73.....	9
Ohio Bell v. Public Utility, 301 U. S. 292.....	9
Railroad v. Pacific, 302 U. S. 388-393.....	9
Strulis v. Barrow, 17 How. 128.....	7

STATUTES AND OTHER AUTHORITIES

14 C. J., pp. 601 and 602.....	4
64 C. J. at p. 115.....	12
Benjamin on Sales (7th Ed.), p. 417.....	4
Black on Rescission (2d Ed.), Sec. 623.....	4
Fletcher on Corporations, Vol. 12, Secs. 5596-7-5604.....	4

Supreme Court of the United States

OCTOBER TERM 1943

No. 439

HARRISON E. FRYBERGER,
Plaintiff-Appellant,
against

CONSOLIDATED ELECTRIC & GAS COMPANY, a corporation organized and existing under the laws of Delaware, and
CENTRAL PUBLIC UTILITY CORPORATION, a corporation organized and existing under the laws of Delaware,
Defendants-Respondents.

PETITIONER'S REPLY BRIEF

Petitioner for his reply to the brief of respondents herein, respectfully shows to the Court:

1) Said answering brief is frivolous, irrelevant and immaterial; it is composed of baseless conclusions and the same can only be regarded as scandalous. The record shows that respondents are guilty of the commission of frauds on Justice Lydon, on the Appellate Division, First Department, on the Chancery Court of Delaware, on Justice McGeehan, and the record shows conclusively that there is not a particle of evidence in the record even tending to sustain the defense of *res judicata*.

2) No denial is made on the record as to the number of shares of Class A stock purchased by plaintiff and his assignors, the dates and prices paid and that plaintiff and

his assignors in January, 1930, held a valid claim against these respondents for the sum of \$17,176, net investment. The record shows, and no denial is made, that a notice of rescission was served on the Central Public Service Corporation in April, 1932. Also that on or about May 6, 1932, plaintiff and his assignors surrendered certificates for 438 shares of Class A stock to the Central Public Service Corporation and demanded back their money. Also that on May 18, 1932, the C. P. S. Corp. assigned all these certificates to a subsidiary called the Central Securities Transfer Company, or that on August 1, 1932, all of these identical certificates surrendered by plaintiff and his assignors were sold, assigned and transferred by the C. P. S. Corp. and its said subsidiary, Central Securities Transfer Company, to the Central Public Utility Corporation, one of the respondents, and this charge is also admitted by Part III of the Plan of Reorganization and there is no denial that there was a rescission by operation of law and a cancellation of the original sale of these certificates of stock. These facts so admitted are decisive of every phase of this controversy.

3) The record shows that these respondents (defendants in the Court below) were asserting throughout the trial of the so-called Harris Case before Mr. Justice Lydon, that the action was one by plaintiff as a stockholder for rescission of contracts, that is, as between himself and these two respondents. See R. Harris Case, fols. 5-2135, 2656-2699, 3110-3113. Justice Lydon so held, R. Harris Case, fol. 5. Also the Appellate Division, First Department, R. Harris Case, fol. 3900. Moreover, when we got to the Court of Appeals, these two respondents filed a formal brief in which they stated (as is set forth at pp. 17, 18 of petition) that this cause of action was tried before Justice Lydon on the theory that it was an action for rescission and not a creditor's bill and that this being the case, the entire proceedings were null and void because an indispensable party defendant, namely, the C. P. S. Corp., was omitted. The same

position was taken by these respondents in their brief entitled "Brief in opposition to motion for reargument". Respondents admit in their brief that all these charges are true. On the other hand, as shown by R. Harris Case, fols. 2392-2398, petitioner (plaintiff in the Court below) asserted as follows:

4) That plaintiff's cause of action as set forth in the Harris Case as between him and these two respondents, was one by plaintiff as a creditor to recover the purchase price and to establish an equitable lien on the assets transferred by the Central Public Service Corporation on August 1, 1932, in violation of his rights, it is only necessary to read the testimony of petitioner (plaintiff in the Harris Case) found R. Harris Case, fols. 2391-2398 on his cross-examination by counsel for defendants. At folio 2392, question and answer are as follows:

"Q. You allege in your complaint, Mr. Fryberger, 'And that by reason of the facts herein set forth plaintiff in the months of April and May 1932 was converted from a stockholder to a creditor of Central Public Service Corporation'. A. Yes, that is true."

Also at R. Harris Case, folio 2398, question and answer are as follows:

"Q. What is your position now, that you are suing here for a decree to rescind the contract of purchase—that is your position now, isn't it? A. My position is this: That having rescinded the purchase of this stock on the ground of fraud, that I am entitled to assert a lien against these assets in the hands of these two new companies for the amount that we paid for that Class A stock with interest, and at the same time that in the compass of the same suit I am entitled to recover whatever damages that I am entitled to from the other defendants."

Under all the authorities, at the present time, a creditor as defined by Section 1 of the New York Fraudulent Con-

veyance Act, is a person having any claim whether mature or immature, liquidated or unliquidated, absolute, fixed or contingent and under all the authorities, it is held that the service of a notice of intention to rescind a transaction is sufficient to make a person a creditor.

See *Black on Rescission* (2d Ed.), Sec. 623.

First National v. Frankel, 235 App. Div. 96 (N. Y.), 14 C. J., pp. 601 and 602.

Benjamin on Sales (7th Ed.), p. 417.

Fletcher on Corporations, Vol. 12, Secs. 5596-7-5604.

5) The record is without dispute that the defense of estoppel by judgment could not be asserted in this case for the reason that the parties, the cause of action and the object of the Harris Case were entirely different from the parties, the cause of action and the object of the present suit. Also it is asserted in the petition and admitted by respondents that there were two distinct causes of action involved, one as claimed by respondents that the cause of action was one by plaintiff for rescission of contracts and the other, a cause of action by plaintiff as a creditor to recover the purchase price of certain stock and to establish an equitable lien. Therefore, under all the authorities a trial of one theory would leave the other open to prosecution at any time. Finally, the record shows, and there is no denial, that the judgment in the Harris Case could not possibly be on the merits.

6) The decision of the New York Court of Appeals in *Fryberger v. Harris*, 273 N. Y. 115, at p. 117, confirms in every particular the position taken by petitioner in his petition. At page 117, second paragraph, the Court of Appeals says:

"The action has been treated and tried as an action in equity. Appellant denominates it as an action in the nature of a creditor's bill. The Appellate Division referred to it as an action for rescission."

The opinion then sets forth the allegations in the bill of complaint from which it appears beyond a doubt that the cause of action was one by plaintiff as a creditor to recover the purchase price of stock and to impress a lien upon assets of the corporation alleged to have been transferred in fraud of creditors. As shown by paragraph 2 of the headnotes, the Court of Appeals held as follows:

"In an action to recover the purchase price of stock and to impress a lien upon assets of the corporation alleged to have been transferred in fraud of creditors, where after trial the complaint has been dismissed and, on appeal, the Appellate Division has unanimously affirmed the judgment entered upon the decision of the trial court, a further appeal may not be taken, without permission, to the Court of Appeals. No constitutional question is presented by plaintiff's contention that the judgments of the courts below are erroneous."

The quotation from the opinion of the Court of Appeals found at bottom of page 2 of the answering brief, signifies nothing, except that Justice Lydon devoted nine days to the trial of this cause of action on the theory it was one by plaintiff as a stockholder for rescission. It had nothing to do with plaintiff's cause of action as a creditor.

To summarize, Justice Lydon, the Appellate Division, First Department, the New York Court of Appeals held that as between plaintiff in the Harris Case, and these respondents, this cause of action was tried on the theory that it was an action by plaintiff as a stockholder for rescission of contracts; while the Court of Appeals held the cause of action as pleaded was one by plaintiff as a creditor to recover the purchase price of stock and to establish an equitable lien.

7) It is alleged in the petition and there is no dispute in the record that respondents in their demurrers to plaintiff's bill of complaint in the Delaware suit falsely and fraudulently represented, that the complaint in the Harris Case

" * * * was dismissed upon the merits after a trial, which dismissal was affirmed by the Appellate Division, First Department, of the State of New York, an appellate court of intermediate jurisdiction, and thereafter said dismissal was further affirmed by the Court of Appeals of the State of New York, the court of last resort in the State of New York, * * *."

These false representations were also set forth in R. this case, fols. 1165-1166, also at fols. 1175-1176. These statements and representations were utterly false because it is admitted on the record that the New York Court of Appeals dismissed the appeal for want of jurisdiction.

The record shows, and there is no denial, that on December 15, 1941, Arthur M. Boal made a false and fraudulent affidavit, which affidavit is found R. this suit, fols. 1270-1273.

8) An examination of the 116 so-called findings of Mr. Justice Lydon in the Harris Case, discloses that there is not one of these findings which is against the recovery by the plaintiff of all he sought. There is no denial by respondents.

An examination of the 14 conclusions of law of Justice Lydon establish beyond controversy that they were drawn on the theory that the cause of action was one by plaintiff as a stockholder for rescission of contracts.

9) The record shows without dispute that some 50,000 potential claimants, as investors, invested the sum of \$78,998,514.70 in Class A stock of the C. P. S. Corp. Also that under the Plan of Reorganization of August 1, 1932, assets of the C. P. S. Corp. of the value of approximately \$116,000,000 were transferred to Consolidated and that this was supposed to represent 70% of the assets and it was represented that the C. P. S. Corp. retained assets of the value of 30% for the protection of creditors, but the record shows that someone on behalf of Consolidated, made false appraisals of the assets retained and that instead of being

worth \$49,000,000 as claimed by Consolidated et al., that the same were not in fact worth a penny. And it is, therefore, admitted on the Record that the said 50,000 investors who contributed the sum of nearly \$79,000,000 to this enterprise, will not receive a penny either directly or indirectly out of the reorganization.

10) The record shows that petitioner has not at any time been afforded an opportunity to protect his property right of the value of over \$100,000. The record shows that plaintiff's cause of action as a creditor was not litigated before Justice Lydon or before the Appellate Division, First Department, or before the Court of Appeals in the Harris Case or before the Delaware Court of Chancery and that this cause of action has not been litigated or fairly submitted either before Justice McGeehan or before the Appellate Division or the Court of Appeals or in the present suit.

At page 2 of their answering brief, the following language is used:

"One of the important conclusions of law adopted by Justice Lydon is No. 9" (R. 140, fol. 419).

"Plaintiff has not sustained the burden of proving that any of the representations made to him were false."

Words are inadequate to describe the silly nature of this statement.

1. These 14 conclusions of law being drawn on the theory that this particular cause of action was one by plaintiff as a stockholder for "rescission of contracts", and that an indispensable party defendant had been omitted, the Court had no power to make any findings or conclusions of law.

Strulis v. Barrow, 17 How. 128.

2. This conclusion of law is referring only to the parties defendants in the Harris Case.

3. These 14 conclusions of law are drawn on the theory plaintiff is still a stockholder.

4. The record is without dispute there was a rescission of the sale of this stock as a question of law, irrespective of whether there was a legal ground therefor.

5. There was no burden on plaintiff to show false representations against any one. If the stock was worthless, or if the corporation was misappropriating assets by the million dollars, or if it was guilty of fraudulent concealment, that would be sufficient.

6. There are other objections.

Also in connection with conclusion of law No. 11 (R. fol. 419):

In *Hurd v. Steam Laundry*, 167 N. Y. 89; also *Cole v. Millerton*, 133 N. Y. 164-168, hold that where one corporation transfers substantially all its assets to another corporation, without the payment of its debts, in equity the transferee assumes and agrees to pay these debts.

I

We respectfully submit that the granting of a writ in this proceeding by this Court is not a matter within its entire discretion.

That petitioner has never at any time been afforded an opportunity to protect his said property right.

That respondents by means of their own misrepresentation and by means of the practicing by them of extrinsic frauds, prevented petitioner from any and all opportunities to protect such property right. Therefore, the recent decision of this Court in *Brinkerhoff v. Hill*, 281 U. S. 673

(See p. 682), is directly in point as shown by paragraph 4 of the headnotes:

“Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. P. 682.”

Also this decision holds in legal effect that petitioner is entitled to a reversal of the judgment of the New York State Courts as a matter of course and not in the Court's discretion.

In *Ohio Bell v. Public Utility*, 301 U. S. 292, it is held in the opinion of Justice Cardozo; paragraph 2 of the headnotes:

“A fair hearing is essential to due process; without it there is condemnation without trial.”

This case cites *Morgan v. U. S.*, 298 U. S. 38-73, also *Brinkerhoff v. Hill*, 281 U. S. 673-682.

It is held in the case of *Railroad v. Pacific*, 302 U. S. 388-393, that there are five requirements of a hearing: (1) Notice. (2) A hearing. (3) An opportunity to be heard. (4) The trial must be a fair one. (5) Before an impartial tribunal—the tribunal must act on evidence and not arbitrarily.

A finding without evidence is arbitrary and useless and an act of Congress granting authority to any body to make a finding without evidence would be inconsistent with justice and an exercise of arbitrary power condemned by the Constitution.

Interstate Commerce v. Louisville, 227 U. S. 88-91;
See many cases cited at page 91.

II

We respectfully ask whether this Court does possess jurisdiction to deny a writ to petitioner.

There are many limitations upon the judisdiction of this Court. For example, there are the provisions of the United States Constitution; statutes passed by Congress; the Ten Commandments and laws passed in response thereto; there is the law against robbery, both the common law and the laws embraced in statutes; there is the law, both common law and statutory, against grand larceny; against obtaining property under false pretenses; the laws against swindling; there are the laws against the practice of misrepresentation and fraud on various courts. A number of these criminal offenses committed by Consolidated are directly involved in this litigation. We respectfully submit, it would be regarded as scandalous if respondents should even suggest that this Court should ignore the criminal laws of the nation.

It may be suggested, there is no remedy if this Court denies the writ. We think there is in this particular case.

III

The New York State Courts were and are seeking to protect certain powerful business interests of certain residents of New York City at the expense of the residents of the forty-seven states not including New York.

It is apparent from the record in this proceeding that respondents resorted to all these misrepresentations and practiced their said frauds on the New York State courts, not on account of the claim or cause of action of petitioner against them, but on account of the potential claims of the 50,000 claimants against them. The real object and purpose of respondents was to nullify all these judicial pro-

ceedings and to secure delay until such time as the ten year Statute of Limitations might serve as a bar to the said claims of the 50,000 claimants.

As shown by the record in the Harris Case, the chief sponsors of respondents are: A subsidiary of the Chase National Bank; Stone & Webster Inc.; Stone & Webster Service Corporation; Public Utility Holding Corporation of America; George E. Devendorf and their associates, all of the City of New York, in the State of New York. (See R. Harris Case, fols. 3398-9, also Exhibits 141 and 142, also fols. 3751-.6)

On the other hand, as shown by page 38 of the petition, the great majority of the 50,000 claimants resided in and do now reside in various others of the 47 states of the Union. Very few of these claimants reside in the State of New York. Therefore, the executed object, purpose and plan of respondents was to exploit the property rights of these 50,000 claimants. To state the case differently, respondents and their sponsors planned and conspired together, and finally prevailed upon the New York State courts to adopt a certain line of decision, the legal effect of which was to evade the doctrine of diversity of citizenship which as a matter of law must prevail in a case of this character.

I V

The record in the Harris Case discloses that the issues as set forth in petitioner's book "Abolition of Poverty" published in August, 1931, the issues of the 1932 campaign as set forth in the Democratic Platform of 1932 and the basic principles of the Federal Statute of June 6, 1934, creating the Securities and Exchange Commission, of the contents of which this Court will take judicial notice, are not merely interrelated but they are inseparable and in effect all three documents denounce the attempt of respondents (a) to prevent petitioner from having his day in court, (b) the attempt on the part of certain residents of New York City to practice a \$78,000,000 swindle on the residents of the other forty-seven states, (c) the attempt by respondents to practice misrepresentation and fraud on various New York State Courts and the Chancery Court of Delaware.

As set forth in 64 C. J. at page 115, it is not essential that documentary evidence shall be marked and formally offered in evidence. Such requisites may be waived. And they are waived where the Court and parties treat an instrument or document as in evidence, e. g., testifying to the contents of the document, etc., citing many authorities.

Although the books "Abolition of Poverty" and "Riches for All" were not marked in evidence in the record in the Court below yet their contents were testified to by witnesses both for petitioner and these respondents. As shown at R. Harris Case, petitioner testified as a witness on behalf of the plaintiff and on cross-examination counsel for respondents elicited the fact that the plaintiff devoted ten years of his practice in Minnesota to the case of *Backus v. Finkelstein*, 23 Fed. (2d) 357. This litigation involved about 130 motion picture theaters, about 40 of which were very actively engaged. The litigation was concluded about

April 1, 1929 except that it took about a year to make a distribution of the fund. Examination of the citator shows that this case is today a leading case, covering certain phases of minority stockholders' litigation. At R. fol. 2924 respondents elicited the fact that the earnings of petitioner for the year 1929 were \$200,000. Also as shown by R. 2264, that the plaintiff had devoted three years, namely from the summer of 1930 to July 1, 1933 to public service and that this public service consisted of the writing of two books and as shown by R. fols. 2980-2981, the fact was brought out by respondents that plaintiff gave the book "Abolition of Poverty" to the defendant, Knutson, and that Knutson bought and paid for the book "Riches for All". Further, respondents offered proof that these books were published by the Advance Publishing Company, R. fol. 2265, also R. fol. 3600. As shown by R. Harris Case, fol. 3602, the witness, Knutson, testified that plaintiff was working untiringly and at a great expense, for himself and the betterment of mankind, including the stockholders who had been defrauded in the past. Evidently, what Mr. Knutson had in mind and the substance of his testimony was to the effect that plaintiff had invested heavily in various stock exchange stocks in the year 1929-1930; that he had been defrauded and cheated and, therefore, decided to devote several years of his time in the writing of these books and to expend a very large sum of money for the purpose of preventing a recurrence of the debacle of 1931 et seq.

As shown by the Harris Case, fols. 3105-7, plaintiff took the stand in rebuttal and testified that the books were regarded by bankers as being more favorable to rich men than any other book covering the subject of economics which had ever been published.

Inasmuch as these books have already been testified to and are already in evidence in this case and both sides have copies thereof, it would greatly simplify the issues and would save this Court a great deal of labor if peti-

tioner were to leave a copy of each of these books with the Clerk of this Court for examination by the members of the Court in case they should care to make such examination. Certainly, the respondents are not in a position to object thereto and it seems to us that this is a matter entirely within the discretion of this Court.

state in the appendix a list of 6 of the outstanding head-

Therefore, we are asking permission of the Court to state in the appendix a list of 6 of the outstanding headlines of the book "Abolition of Poverty" and also where reference is made at a certain page of the book "Abolition of Poverty".

As shown by the cover of the book "Riches for All", a large number of copies of the book "Abolition of Poverty" were furnished at the time of its publication, to all the leading newspapers of the nation, also to prominent men of the day including the candidates for President, outstanding members of the United States Senate and House of Representatives, Economists, also judges of our Courts. And also as shown by the blurbs on the cover of the book "Riches for All" the book "Abolition of Poverty" received a vast amount of publicity by the newspapers throughout the nation. The candidate for the Democratic Party seemed to appreciate at once the political value of the issues raised by the book "Abolition of Poverty" and he had the intelligence, the intuition to note that these issues would be almost unbeatable in a national election. As the members of this Court probably recall, President Hoover took no notice of these ideas until a week or two before the election at which time he advocated a more equitable distribution of wealth; but it was too late. In order to show the impression made by this book upon Mr. Roosevelt and the Democratic Party, we quote from the Democratic National Platform of 1932 as follows:

"Regulation to the full extent of Federal Power of (a) holding companies which sell securities in interstate commerce (b) rights of Utilities operating across state lines (c) Exchanges in securities and commodities."

On June 6, 1934 a Federal Statute created the Securities & Exchange Commission and inasmuch as this law was one providing for a reform, the law itself sets forth at great length the reasons why this Statute is Constitutional. The law itself referred to and related back not only to the reasons set forth in the Democratic Platform in the campaign of 1932 but also to the reasons and grounds set forth in the book "Abolition of Poverty" not, however, specifically mentioning the name of the Democratic Party or the book "Abolition of Poverty".

We respectfully submit that this Court will take judicial notice of everything contained in this Statute of June 6, 1934.

Stated differently, these three documents offer conclusive proof against the validity of proceedings in the New York State Courts and the transactions involved herein.

V

A constructive suggestion.

As already stated, no specific claim of any particular claimant is up for review in this proceeding except that of petitioner. Respondents assert that petitioner is the only Class A stockholder who rescinded the purchase of his Class A stock (R. Harris Case, fol. ³⁰¹⁸~~2408~~) but we respectfully submit that the 50,000 potential claimants offer a very strong, really a conclusive argument why a writ herein should be granted as prayed for.

First, the claim of petitioner is based upon undisputed facts in the record, and the only issue to be determined so far as his claim is concerned is the matter of taxable costs and disbursements.

Second, the granting of the writ would serve notice that respondents must litigate all these claims either in the Court below or perhaps in a separate Federal suit.

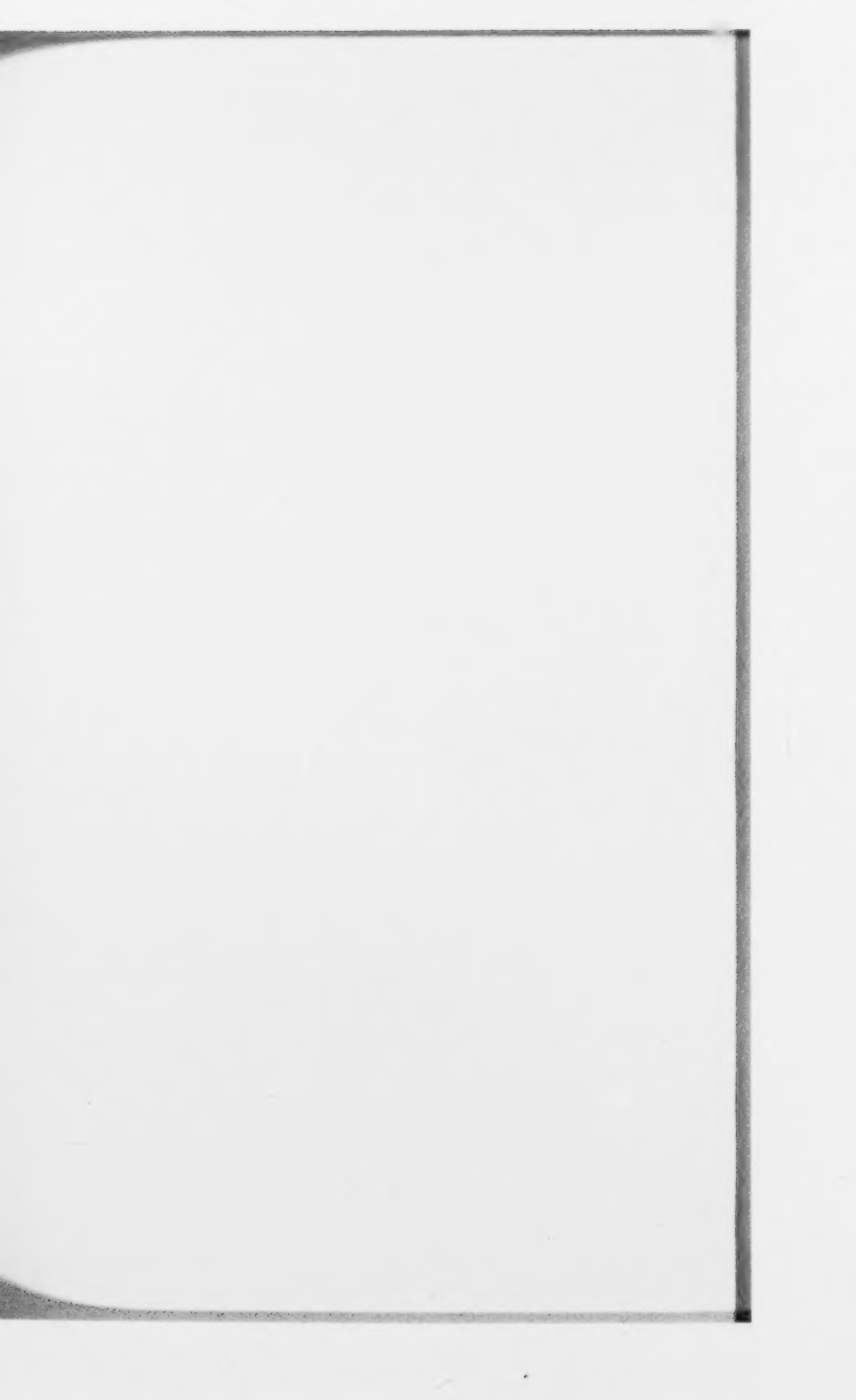
Third, the defense of the present suit would collapse and it is quite probable that the entire controversy should be settled by stipulation.

Fourth, in lieu of such settlement, the parties could and probably would agree upon a statement of facts and might also agree to refer the controversy to a master or the Securities & Exchange Commission.

Fifth, we are much impressed with the conclusion that the so-called bloc of 50,000 claimants is entitled to a percentage, for example, of 30% of the fund to be distributed. (a) Probably not more than 1% of them are even aware that they possess a claim; (b) presumably, several thousand of them are at the present time engaged in the present war and they are not in a position to protect themselves; (c) it would entail great expense upon these claimants to even prepare a list of just who these claimants are. As shown by R. Harris Case, folio 1752, it is very uncertain where the books and records of the C. P. S. Corp. are located and it is plain that it would take a solid month to locate any particular record in the Baltimore Trust building and the larger part of these books and records are in Chicago, and some storage house is holding them and claiming a lien and even the C. P. S. Corp. may have no access to them. See folios 1766-1767. It is further obvious that if a certain percentage of the fund were awarded to this bloc of claimants, the respondents would no longer have any reason for withholding information. (d) This litigation being essentially nationwide in its scope, we respectfully submit that it would be especially appropriate if this Court were to bear in mind the peculiar exigencies of this case.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued as prayed for in his petition.

HARRISON E. FRYBERGER,
Counsel for Petitioner.





APPENDIX

The outstanding headlines of the book "Abolition of Poverty" are as follows:

1. The exploitation of the South and West by the East.
2. The domination of business by stock market speculation.
3. The impositions practiced by stock manipulators upon investors.
4. The concentration of wealth.
5. The true status of our stock exchanges.
6. Capitalism must not be left unrestrained.

And as shown, among the remedies set forth at page 86 of the "Abolition of Poverty" the first remedy suggested is that of a regulatory Federal Statute.



13
No. 439

Office - Supreme Court, U. S.

FILED

DEC 31 1943

CHARLES ELMORE CROPLEY

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

HARRISON E. FRYBERGER,

Petitioner,

against

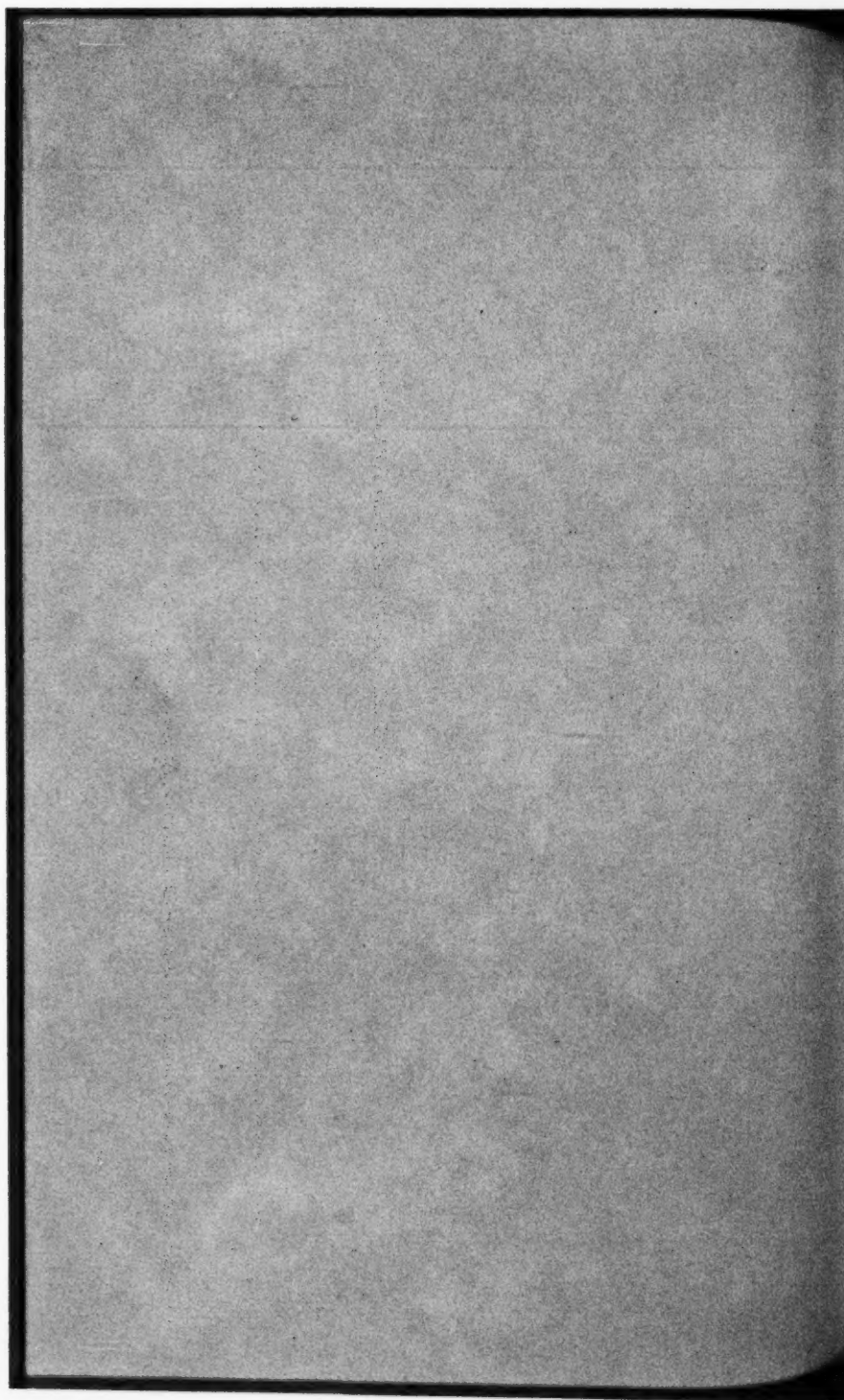
**CONSOLIDATED ELECTRIC AND GAS COMPANY, a corporation,
and CENTRAL PUBLIC UTILITY CORPORATION, a corporation,**

Respondents.

PETITION FOR REHEARING

HARRISON E. FRYBERGER,

Petitioner.



INDEX

	PAGE
Statement	1
SUBDIVISION I—Changes as to Real Parties in Interest...	5
Law of 'the' Case.....	9
SUBDIVISIONS II, III AND IV	12
SUBDIVISION V.....	16

CASES CITED

Aetna Life v. Haworth, 300 U. S. 227.....	11
American Surety Company v. Conner, 251 N. Y. 1.....	14
Butler v. Eaton, 141 U. S. 240.....	10
California v. San Pablo, 149 U. S. 308.....	16
Case v. Beauregarde, 101 U. S. 688.....	15
Cobb v. Interstate, 20 Fed. (2d) 786.....	15
Cover v. Schwartz, 133 Fed. (2d) 541.....	11
Dakota County v. Glidden, 113 U. S. 222.....	12, 17, 18
Duke Power v. Greenwood, 299 U. S. 259.....	19
Gulf v. Dennis, 224 U. S. 505.....	10, 11, 19
Hoffman v. McClelland, 264 U. S. 552.....	10
Keeley v. Ophir Hill, 169 Fed. 605-606.....	11
Kimball v. Kimball, 174 U. S. 158.....	9
Marcus v. Kane, 18 Fed. (2d) 722.....	15
Newell v. Consolidated, New York Supreme Court, serial number 17312—1942.....	5
Osborne v. U. S. Bank, 9 Wheaton 738.....	16

	PAGE
Radio Corp. v. General Electric, 281 U. S. 464.....	11
Seneca v. Leach, 241 N. Y.	15
Shapiro v. Wilgus, 287 U. S. 348.....	15
United States v. Alaska, 253 U. S. 113.....	17
United States v. Corrick, 306 U. S. 583.....	11
United States v. Hamburg, 239 U. S. 466.....	10, 19
United States v. Schooner Peggy, 1 Cranch, 103.....	19
Vandenbark v. Owens Ill., 311 U. S. 538.....	10, 19
Watts v. Union, 248 U. S. 9.....	10
Wyman v. Wallace, 201 U. S. 230.....	15

MISCELLANEOUS

Benjamin on Sales, 7th Ed., p. 417.....	15
Black on Rescission, 2nd Ed., Sec. 623.....	15
I C. J. Sec. p. 1411, Sec. 133.....	12
Simkins Federal Equity Practice, Sec. 963, p. 683.....	10

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CONSOLIDATED ELECTRIC AND GAS COMPANY, a corporation,
and CENTRAL PUBLIC UTILITY CORPORATION, a corporation,

Respondents.

PETITION FOR REHEARING

Now comes the above named petitioner and for his petition for a rehearing in said cause, respectfully shows to the Court and alleges:

There are five grounds upon which petitioner seeks a rehearing:

I

Since the trial of said case in the Court below before Mr. Justice John E. McGeehan in June, 1941, there have been such drastic and far reaching changes in the facts and law governing this litigation that the New York State Courts have lost jurisdiction to enter the order of Justice McGeehan of January 14, 1942, his judgment of February 9, 1942, the judgment of the Appellate Division of January 21, 1943, the memorandum decision of July 20, 1943 and by reason of said changes, this Court has at no time acquired jurisdiction to enter its order of December 6, 1943.

On November 18, 1941 Consolidated filed with the Securities & Exchange Commission its petition in which it set forth that it desired to be placed under the control of the Commission; that the net assets of Consolidated at that time amounted to about \$13,300,000 and that the object of the petition was to secure, in substance, the final dissolution of Consolidated Electric and Gas Company and that these proceedings were preliminary to the distribution of the entire assets of said Consolidated. That, in substance, Consolidated desired to transfer all its assets to the potential control of said Commission and to abandon the proceedings in the New York State Courts.

That heretofore, to wit, on January 28, 1942, petitioner in response to said petition, filed a petition for leave to intervene before said Commission and that thereafter the said Commission on February 20, 1942 under an entire misapprehension of the facts and the law used the following language in a memorandum opinion and order denying said application of petitioner for leave to intervene as a creditor until he secured the entry of judgment that he is a creditor:

"A suit in the Supreme Court of the State of New York, seeking to establish this claim as a cause of action against Consolidated Electric and Gas Company and others, resulted in a decision in favor of the defendants, which decision was affirmed by both the Appellate Division and the Court of Appeals of the State of New York. A bill in equity in the Court of Chancery of Delaware was dismissed on the grounds that the matter was *res judicata*."

As shown by this language, the Commission was acting under a gross misapprehension. First, that the New York Court of Appeals had actually affirmed a decision of the New York Supreme Court when in reality the New York Court of Appeals had dismissed the appeal on the ground of want of jurisdiction and said Commission overlooked the fact that there was not a spark of evidence tending to support the contention of estoppel by judgment or estoppel

by verdict. What is more important yet, inasmuch as said cause of action in the so-called Harris Case in the New York Supreme Court was decided on the theory that the cause of action was one by petitioner for "rescission of contracts", that it must be dismissed because C. P. S. Corp. was an indispensable party and being omitted therefore the decision was not on the merits.

What is even more important, the Commission overlooked the fact that since the year 1925, there has been in full force and effect a New York Statute which defines a creditor and which is construed by the New York Court of Appeals as well as in the United States Supreme Court to mean that it is unnecessary that a judgment be entered; that in order to establish that a claimant is a creditor it is sufficient if he enters a claim or makes a demand as a creditor.

In truth and in fact, petitioner has actually been treated and regarded as a creditor by said Commission since February, 1942. That heretofore, to wit, on July 21, 1943, respondents filed with said Commission a notice of filing an amended Plan of Reorganization, etc. On November 13, 1943, the Commission filed an order postponing the hearing of all matters involved in said original plan and said amended plan and all of the matters dealing with the right of petitioner and all the so-called 50,000 claimants, to file petitions for leave to intervene concerning all the said matters including the rights of said 50,000 investors to intervene and their rights to share in the distribution of said assets and also their rights in case of the dissolution of Consolidated or in case it is held that Consolidated is a bankrupt, etc.

In said order of November 13, 1943, it is provided that a hearing on all these matters will be held by the Commission on February 15, 1944, and that petitioners who desired to intervene must file petitions for leave to intervene on or before February 10, 1944.

II

There is not a spark of evidence in the Record even tending to sustain the defense of *res judicata* set forth by respondents.

III

There is not a spark of evidence in the entire Record which even tends to support the judgment of Justice Lydon of October 14, 1935, or the judgment of the Appellate Division, First Department, of July 1, 1936, or the opinion of Chancellor Wolcott of May 25, 1938, or the order of Justice McGeehan of June 30, 1941, or his memorandum decision of January 14, 1942, or his judgment of February 12, 1942, or the judgment of the Appellate Division, First Department, of January 21, 1943, or the memorandum decision of the Court of Appeals of July 20, 1943, found in 291 N. Y. 556.

IV

For the reasons set forth in our petition for a writ, also in our reply brief as well as herein, the decisions and judgments of the New York State Courts which are complained of, are not simply voidable but absolutely void and subject to collateral attack. Therefore, this Court has no power to resuscitate them.

V

This Court will determine only matters actually in controversy essential to the decision of the particular cases before it. Where by an act of the parties, or a subsequent law, the existing controversy in the New York State Courts has come to an end, the case becomes moot and should be treated accordingly. The duty of this Court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. This Court is not empowered to decide moot questions or abstract propositions or to declare principles or rules of law for the government of future cases.

SUBDIVISION I

Changes as to Real Parties in Interest

As already shown on November 18, 1941, Consolidated, by the filing of such petition, decided to abandon the proceedings involved in said New York State Court and since February, 1942, petitioner has been recognized by the Securities & Exchange Commission as a creditor and party in interest.

In the summer of 1942, petitioner was employed by some 10 of said 50,000 claimants holding claims against Consolidated aggregating over \$70,000. The details of this litigation are found in the case of *Newell v. Consolidated*, serial number 17317-1942 of the files of the New York Supreme Court. Likewise, petitioner is informed by various associates of Mr. John W. Shaffer, residing in Minneapolis, Minnesota, that he, said Shaffer, has been engaged in the matter of organizing the said 50,000 claimants and that at this time he represents several hundred of the 50,000 claimants who actually hold valid claims against Consolidated aggregating in amount to more than \$1,000,000; that said claimants, so represented, all reside outside of the State of New York and that said claimants represented by said Shaffer and his associates reside in a large number of the states of the Middle West and that the said claimants represented by petitioner, as well as said claimants represented by said Shaffer et al., propose to file petitions in intervention before the said Commission on or before February 10, 1944, and they all propose to participate in the hearing which has been set for February 15, 1944, by said Commission, at which hearing the Commission will consider and decide whether or not it is true that 85% of said 50,000 claimants surrendered their certificates of Class A stock to the C. P. S. Corp. and accepted stock in the C. P. U. Corp. under the representa-

tion that assets of the old C. P. S. Corp. of the actual value of over \$49,000,000 had been set apart for distribution among said Class A stockholders of the C. P. S. Corp. As shown by the record referred to by our petition for a writ of certiorari and the reply brief, it has turned out by the evidence submitted before said Commission since November 18, 1941, that these assets retained by the C. P. S. Corp. instead of being worth \$49,000,000 were actually not worth a penny. That such facts should in the nature of things have been decided differently by the Commission and that it is proposed by said Commission to have a plenary hearing on February 15, 1944, at which all parties in interest are required to appear and present their claims.

It is probably true that a criminal prosecution against C. P. S. Corp. by that name would be prevented by the Statute of Limitations, and it may be true that a criminal prosecution of Consolidated might be outlawed to quite an extent but not altogether.

In the meantime, all of said questions are "*in nubibus*"; they are mere moot questions, hypothetical questions, and this Court does not have even the slightest jurisdiction over either moot questions or hypothetical questions.

It now appears upon the undisputed evidence that in the year 1942 the gross income of Consolidated was over \$36,000,000 and its net income was \$1,871,000. The files of the Securities & Exchange Commission disclose that during the past 10 years over \$5,000,000 has been paid to the Stone & Webster Service Corporation for managing the operations of Consolidated since the spring of 1933. In the light of these admitted facts, the statement found in the plan of reorganization of August 1, 1932, that Stone & Webster, Inc., is a wholly disinterested concern, is ridiculous. This is especially true because the scheme had already been cut and dried between Public Utility Holding Corporation, Stone & Webster, Inc., and others, to take possession of these assets, and as shown by R. Harris Case (fol. 3402), in the letter of Consolidated of

January 18, 1933, the gross earnings of Consolidated for the year ended September 30, 1932, amounted to \$21,000,000. The evidence is conclusive that George E. Devendorf, who is the president and general manager of Consolidated, was also in control of its assets in 1932. Petitioner respectfully submits that it looks very strange on the face of things as to these 50,000 claimants who contributed nearly \$79,000,000 of real money toward this C. P. S. Corp. enterprise; that their entire contribution should be turned over to Consolidated and that these persons engaged in a criminal conspiracy to defraud should be permitted to appropriate the entire assets to themselves, leaving nothing whatever for the 50,000 investors who reside outside of the State of New York.

That the New York State Courts have never had the slightest jurisdiction to pass upon the death sentence clause of the Public Utility Holding Act or the Public Utility Holding Statute or over the Securities & Exchange Commission Statute or upon its procedure or over its decisions. The Commission has actually the powers of a bankruptcy court and that if it be true that Consolidated is in truth and in fact utterly insolvent and bankrupt, that the New York State Courts have no jurisdiction whatever to decide what action shall be taken by the Commission. Furthermore, the above facts being true, this Court had no jurisdiction to make the order which it made on December 6, 1943, purporting to deny the petition of petitioner for a writ. Under a long line of decisions of this Court covering just such a case as this, it has been held by this Court that the only jurisdiction it had would be one of three courses of action:

a) To grant the petition of petitioner for a writ as applied for.

b) To set aside each and all of the judgments rendered in the New York State Court, since June, 1941.

c) To continue the proceedings in this Court until the Securities & Exchange Commission has completed its findings and decisions in the above matter. That is,

referring to the amended petition of Consolidated, a copy of which is herewith submitted and proceedings concerning which are to be brought on for hearing on February 15, 1944.

Moreover, since the adoption of our Constitution in 1789, it has been one of the cardinal principles of our Government that the doctrine of diversity of citizenship is applicable to the non-residents of any State in the Union—they cannot be compelled to submit their controversies to the State Court of any other State.

It should not be overlooked that the said petition of November 18, 1941, was actually offered in evidence before the New York Court of Appeals upon the argument of June 20, 1943. Not only that, but the substance of this petition was published in the New York Times of November 20, 1941, and every one of said New York State Courts has had actual notice and knowledge of the purport of said petition ever since that date. Moreover, the substance of the proposed amended Plan of Consolidated was published in the New York daily papers, shortly after July 21, 1943.

Ever since January, 1933, except as herein qualified, Consolidated has been stating not only orally but by sworn affidavits, that it has not done any business in the State of New York but that it has only been doing business in the State of New Jersey or incidentally in the State of Delaware. But heretofore, to wit, in the summer of 1942, petitioner secured evidence from the files of Consolidated and otherwise, that during said entire ten year period, Consolidated has been doing business in the State of New York uninterruptedly; that it has carried very large accounts during that time in the Chase National Bank in New York City and has been carrying a large bank account in Public National Bank in New York City; that it has several hundred employees at 90 Broad Street in New York City; that it has been using a large portion of said building for the purpose of carrying on all its business;

that its directors and officers have resided in the State of New York during said time and that it has been only during the past year that Consolidated now states in writing that its office is at 90 Broad Street, New York City.

If it be true, as it is true, that the New York State Courts have no jurisdiction to decide any controversy now pending before the said Commission in this litigation and that the Federal Supreme Court has no jurisdiction to deny our petition for a writ, just what are the big questions involved in this litigation? There are two:

FIRST: Is it practically feasible for the Commission to protect the rights of the 50,000 investors as against the rapacity of Consolidated and its attorneys and agents, and its various sponsors including the New York Stock Exchange?

SECOND: If such an accomplishment is not feasible, will it be possible to prevent the American people from repealing the statute creating the Commission. In other words, we respectfully submit that the life and very existence of the Commission is involved in this litigation. In our view, the creation of the Commission was one of the real accomplishments of the Roosevelt Administration.

On November 30, 1943, petitioner wrote a letter to the Clerk of this Court in which he enclosed the said petition of November 18, 1941. Petitioner is informed that Mr. H. B. Willey, Clerk of this Court, duly presented this communication and petition to the Court on or about December 1st.

Law of the Case

In the case of *Kimball v. Kimball*, 174 U. S. 158, it is held that this Court is bound to consider any change in the facts occurring during the pendency of an appeal or since the judgment to be reviewed which affected its right and duty to proceed in the exercise of its appellate jurisdiction but

which did not appear in the record, to be proven by extrinsic evidence.

See also:

Simkins Federal Equity Practice, Section 963, p. 683.

In the case of *Watts v. Union*, 248 U. S. 9-21, it is held that this Court has the power not only to correct error in the judgment, but to make such disposition of the case as justice may require.

Citing:

Butler v. Eaton, 141 U. S. 240.

Gulf v. Dennis, 224 U. S. 505-506.

And in determining what justice now requires, the Court must consider the changes in fact and law which have supervened since the decree was entered below.

Citing:

United States v. Hamburg, 239 U. S. 466, 475, 478.

In the recent case of *Vandenbark v. Owens Ill.*, 311 U. S. 538-542, it is held that an appeal must be disposed of not as of the time judgment was entered (in the Court below) but as of the time the appeal is disposed of (this case was decided Jan. 6, 1941).

In the case of *Butler v. Eaton*, 141 U. S. 240 (where the Court reversed with instructions), the Court held that the necessary investigation to be made would involve the exercise of original jurisdiction, as to which it is not competent.

In the case of *Hoffman v. McClelland*, 264 U. S. 552, this Court recognized the doctrine of intervention "pro interesse suo" in a case where a tribunal has impounded the property.

See cases cited, p. 558.

In the case of *Keeley v. Ophir Hill*, 169 Fed. 605-606, an appeal in an equity suit was dismissed where the facts in controversy had been determined pending appeal in an action at law between the same parties.

In the case of *Gulf Railway v. Dennis*, 224 U. S. 508-509, it was held that a judgment in a state court below should be vacated so that the state court might apply the decision by awarding a new judgment.

We find a very interesting case decided by the Second Circuit Court of Appeals, namely, *Cover v. Schwartz*, 133 Fed. (2d) 541. This case was decided December 17, 1942, and it reviews a large number of authorities holding that the Federal Courts cannot constitutionally give advisory opinions since the Constitution confers jurisdiction on the Federal Courts only where there exists a real case or controversy and construing Article III, Section 2 of the United States Constitution. In *Cover v. Schwartz* just cited, it is held that a Court's awareness of its lack of jurisdiction need not come from the record of the case; it may come from appellant's brief or oral argument or otherwise.

The difference between a moot case and a real substantial controversy is set forth in the case of *Aetna Life v. Haworth*, 300 U. S. 227, 240. It is there held that an opinion advising what the law would be upon a hypothetical case would be moot.

See cases cited at p. 241.

In the case of *Radio Corp. v. General Electric*, 281 U. S. 464, it is held that the Federal Supreme Court cannot exercise or participate in the exercise of functions which are essentially legislative or administrative.

The parties to litigation cannot waive the question, the lower Court had no jurisdiction over the subject matter of the suit.

United States v. Corrick, 306 U. S. 583.

In the case of *Dakota County v. Glidden*, 113 U. S. 222, a case very much like the one at bar, it is held that the Federal Supreme Court will receive evidence outside of the record for the purpose of determining its action. In this case, it was cited that the death of one of the parties or the transfer of interest by assignment or by a judicial proceeding in another court as in bankruptcy or otherwise, is brought to the attention of the Court by evidence outside the original record and acted on.

At page 226 of the opinion of this Court, the correct practice is outlined in a situation such as we find in the instant case, namely, either this Court has the power to vacate the judgments and rulings of the lower Court since June 30, 1941 inclusive, or in its discretion, this Court may continue the proceedings in the instant case before it until there has been a complete hearing and decision by the Securities & Exchange Commission of the matters which are set for hearing for February 15, 1944.

Where an action is pending in both State and Federal Courts (or before a Federal tribunal) that Court which first takes possession or control actual or potential of the res, will exercise its power to completion and the other Court should stay proceedings before it pending the determination in the other tribunal.

See:

I. C. J. Sec. p. 1411, Section 133.

SUBDIVISIONS II, III AND IV

These three subdivisions may be considered together. They have been clearly and exhaustively considered and presented in our petition for a writ as well as in our reply brief. In the answering brief of respondents no denial is made as to the correctness of these charges contained in our petition for a writ.

A) While under the pleadings in the so-called Harris Case, a real controversy was raised yet in the proceedings before Justice Lydon, before the Appellate Division, First Department, on appeal, before the New York Court of Appeals in the so-called Harris Case, these proceedings were entirely moot and they did not present any real controversy and like all moot court proceedings the same were null and void and subject to collateral attack.

B) Likewise, the proceedings in the Delaware Court of Chancery, being based entirely upon the proceedings before Justice Lydon and in the Harris Case, are also moot and null and void and subject to collateral attack.

C) Likewise, inasmuch as in the suit tried before Mr. Justice McGeehan in June, 1941, the only defense urged was the defense of res judicata, it follows that this defense necessarily is "out the window".

D) Likewise, the proceedings before the Appellate Division, First Department, on appeal from the order and judgment of Justice McGeehan which ended in the so-called judgment of the Appellate Division of January 21, 1943, is necessarily null and void and subject to collateral attack and furnishes no support for the defense of res judicata.

E) Likewise, the order of the Appellate Division of February 11, 1943 and the order of the New York Court of Appeals of the date of April 22, 1943 denying the application of petitioner (plaintiff in the court below) for leave to appeal to the New York Court of Appeals, could not furnish any support for the defense of res judicata.

F) Likewise and for the same reason the memorandum decision of July 20, 1943 found in 291 N. Y. 556, furnishes no support for the defense of res judicata.

1) An analysis of this memorandum decision may be worth while. This memorandum decision shows on its face that it is a collection of self-serving declarations found chiefly in the false affidavit of Arthur M. Boal and in the brief of respondents.

At the bottom of p. 557, reference is made to the fact that plaintiff had offered no evidence in the trial before Justice McGeehan which had not been offered before Justice Lydon but as we show in our petition for a writ, this statement is false. Justice Lydon found in his so-called finding No. 16, R. this case, 307-309, that only 70% of the assets of the Central Public Service Corporation had been transferred to Consolidated and that as of the date August 1, 1932, 30% of the assets had been retained by Central Public Service Corporation but in the suit before Justice McGeehan it was alleged in the complaint (R. fol. 63) and it was established by Plaintiff's Exhibits 6, 7, 8, 9, 10, 11 and 12 (all described on p. 4 of our petition for a writ of certiorari), that the assets retained by Central Public Service Corporation, were in truth and in fact, not worth a penny but for reasons set forth on p. 4 of our petition for a writ, the assets retained were in one sense of the value of \$28,000.

But there are several additional conclusive reasons why the so-called memorandum decision (found at 291 N. Y. 556) does not offer the slightest proof of *res judicata*. Some of these reasons are as follows:

In 1925 the State of New York adopted a Statute called Debtor and Creditor Law, in which the term creditor is defined as "a person having any claim whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent". And the substance of this law is set forth in paragraph 1 of the headnotes of the case of *American Surety Company v. Conner*, 251 N. Y. 1. The opinion in this case is written by Judge Cardozo. This headnote is as follows:

"The ancient rule, whereby a judgment and a lien were essential preliminaries to equitable relief against a fraudulent conveyance, has been abrogated by article 10 of the Debtor and Creditor Law (Cons. Laws, ch. 12). Under the statute the creditor may reject the aid of equity and levy attachment or execution at law, or he may seek the aid of equity, and, without attachment

or execution, establish his debt, whether matured or unmatured, and challenge the conveyance in the compass of a single suit."

And this Court in the case of *Shapiro v. Wilgus*, 287 U. S. 348 at p. 356, holds that under this New York Statute, it is unnecessary to reduce a claim to judgment and exhaust his remedy at law, although as a general rule, it is necessary to do so in the Federal Courts but even in the Federal Courts it would be unnecessary for plaintiff to reduce his claim to judgment. See *Case v. Beauregarde*, 101 U. S. 688 and *Wyman v. Wallace*, 201 U. S. 230-242. And the same doctrine is held in the case of *Cobb v. Interstate*, 20 Fed. (2d) 786. See paragraph 3 of the headnotes.

"Where creditor's only remedy is in equity, as where he seeks to establish a liability which only equity will recognize, or to enforce an equitable lien or trust, it is not necessary that judgment be obtained and execution returned unsatisfied before suing."

Marcus v. Kane, 18 Fed. (2d) 722 (C. C. A.), holds that a claim "entered" or demanded is a claim by a creditor. And the authorities are uniform as to the precise moment a stockholder is converted from the status of a stockholder to the status of a creditor. It is stated in Benjamin on Sales, 7th Ed., p. 417, as follows:

"It is not necessary that there should be a judgment of court in order to effect the avoidance of a contract when the deceived party repudiates it. The rescission is the legal consequence to reject it and takes date from the time he announces his election to the other party."

Black on Rescission, Second Ed., Section 623, holds the same and *Seneca v. Leach*, 241 N. Y. holds to the same doctrine.

In the instant case, there is no dispute in the record that the plaintiff in the Court below actually served and filed a notice of rescission in April, 1932. See our petition for writ of certiorari, pp. 4 and 5.

Both in the allegations of the complaint of plaintiff in the Harris Case, R. fols. 169, 194-195 and in the prayer for relief, there is not even the slightest dispute but that the suit of plaintiff in the Harris Case was one by plaintiff as a creditor.

The best evidence, the test as to what is shown in the record is the record itself. There is no dispute in the record on this issue.

In lines 16, 17 and 18, p. 557 of 291 N. Y. 556-557, the Court Reporter used the following language:

"It being decreed that he (plaintiff) had failed to establish a right to a rescission of said purchase."

The ridiculous nature of this assertion is clearly seen when we bear in mind the New York Statute just referred to and the facts of this case as admitted in the record.

SUBDIVISION V

A justiciable controversy is defined by Chief Justice Marshall in the case of *Osborne v. U. S. Bank*, 9 Wheaton 738-819. That case was decided in the year 1824—120 years ago—and since that decision it has been held continuously by this Court that before this Court can exercise appellate jurisdiction there must be a real controversy between two parties. A moot case is insufficient to confer jurisdiction.

In the case of *California v. San Pablo*, 149 U. S. 308, the headnote is as follows:

"If, pending a writ of error to reverse a judgment for the defendant in an action by a State to recover sums of money for taxes, the defendant offers to the plaintiff, and deposits in a bank to its credit, the amount of those sums, with penalties, interest and costs, which by a statute of the State have the same effect as actual payment and receipt of the money, the writ of error must be dismissed."

At page 314, the Court used the following language :

"The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

In the case of *U. S. v. Alaska*, 253 U. S. 113, paragraph 1 of the headnotes is as follows :

"This court will determine only matters actually in controversy essential to the decision of the particular case before it."

At page 116, this Court uses the following language :

"Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

In the case of *Dakota County v. Glidden*, 113 U. S. 222, this Court used the following language :

In a case such as this, the Federal Supreme Court will receive evidence outside the record for the purpose of determining its action. In this case, it was

cited that the death of one of the parties, or the transfer of interest by assignment or by a judicial proceeding in another court as in bankruptcy or otherwise, is brought to the attention of the court by evidence outside the original record and acted on.

From what has already been stated, it appears that the real controversy between the parties to this litigation so far as the New York State Courts are concerned, came to an end at least beginning with November 18, 1941. We respectfully submit that the act on the part of Consolidated of filing the petition with the Commission on that date was a confession by Consolidated that it had no possible defense to the New York suit tried before Mr. Justice McGeehan in June, 1941, and at least from that date the proceedings in the New York State Courts could only be regarded as the proceedings of a moot court.

Since that time, to wit, in July, 1943, Consolidated has asked leave of the Commission to file and has filed a proposed amended petition.

We respectfully submit that under all the authorities, all the decisions of this Court, this Court had no jurisdiction to file its order of December 6, 1943 purporting to affirm these moot court proceedings in the New York State Courts. But this does not signify that this Court does not have jurisdiction to render certain relief. This Court holds in *Dakota County v. Glidden*, 113 U. S. 222, that this Court has jurisdiction to send a case back to the State Court with instructions to vacate all the said proceedings which occurred in said State Court subsequent to November 18, 1941 and this includes the vacation of all said judgments hereinbefore described or it is possible that in its discretion this Court has the jurisdiction to stay all proceedings in this court until the Commission has made a full and complete decision as to all the matters involved in said petitions and as to the rights of all these claimants included in the 50,000 to file petitions and for their rights passed on by said Commission.

In the case of *Gulf Railway v. Dennis*, 224 U. S. 508-9, it was held that the judgment in the State Court below should be vacated so the State Court may apply the decision by awarding a new judgment.

In this case at pages 508-509, the Court used the following language:

"We conclude that in the exercise of our appellate jurisdiction over the courts of the several States we are not absolutely confined to the consideration and decision of the Federal questions presented, but as a necessary incident of that jurisdiction are authorized to inquire whether by some intervening event those questions have ceased to be material to the right disposition of any particular case, and to dispose of it in the light of that event.

The present case is not one in which the writ should be dismissed, because that would leave the judgment to be enforced as rendered, which the intervening decision shows ought not to be done. Instead of being an obstacle to granting any effectual relief to the plaintiff in error, that decision constitutes in itself an all-sufficient ground for relieving it from the attorney's fee, independently of the Federal question presented on the record; and for the reasons before stated we think it becomes our duty to vacate the judgment so that the state court may apply the decision by awarding a new judgment in conformity therewith."

Also we find that this decision has been cited by this Court with approval in a large number of recent decisions. See for example:

U. S. v. Hamburg, 239 U. S. 466, 475-478;

Duke Power v. Greenwood, 299 U. S. 259, 267-268;

Vanden Mark v. Owens, 311 U. S. 542.

And this same principle was recognized in the case of *U. S. v. Schooner Peggy*, 1 Cranch, 103-110, which was decided in 1801.

WHEREFORE, petitioner prays that this Court shall grant this petition and shall further grant:

1) Our petition for writ of certiorari as prayed for in our original petition.

2) That in any event, the Court shall vacate the judgment entered in the courts below since the trial of the case before Mr. Justice McGeehan in June, 1941.

3) That the Court in its discretion stay all proceedings in this case until there has been a complete adjudication of all the matters submitted to the Securities and Exchange Commission.

4) That this Court grant such other and further relief as to this Court may seem just.

HARRISON E. FRYBERGER,
Petitioner.

I DO HEREBY CERTIFY, that the above application is meritorious and presented in good faith, and is not undertaken for the purpose of delay.

HARRISON E. FRYBERGER,
Petitioner.

